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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Terrorist Attacks on
September 11, 2001

03 MD 1570 (GBD)

New York, N.Y.
January 18, 2018
10:08 a.m.

Before:

HON. GEORGE B. DANIELS,
District Judge
-and-

HON. SARAH NETBURN,
Magistrate Judge

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MR. CARTER: Good morning, your Honors. This is Sean Carter, Cozen, O'Connor, on behalf of the plaintiffs' executive committee.

JUDGE DANIELS: Good morning.

MR. KREINDLER: Good morning, your Honors. Jim Kreindler on behalf of the plaintiffs' executive committee and the Ashton plaintiffs. I'd like to introduce my partner, Steve Pounian. Steve and I have worked together for 35 years representing victims, and Steve will be speaking to you on behalf of the Ashton plaintiffs.

JUDGE DANIELS: Good morning.

MR. PUNION: Steve Pounian, your Honor, for Kreindler and Kreindler.

JUDGE DANIELS: Good morning.

MS. FLOWERS: Good morning, your Honors. Jodi Flowers on behalf of the plaintiffs' executive committee and the primary Burnett plaintiffs, many of whom are with us here in the room today. I just want to take a moment to welcome them all and thank them for being here. And thank the Court and Court staff for opening up the extra courtrooms.

JUDGE DANIELS: Good morning.

MR. MALONEY: Good morning, your Honors. Andrew Maloney for the Ashton plaintiffs and liaison counsel for the PEC.

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1 JUDGE DANIELS: Good morning.

2 MR. GOLDMAN: Good morning. Jerry Goldman for the PEC
3 and the O'Neill plaintiffs, the putative class and
4 approximately 300 other families.

5 JUDGE DANIELS: Good morning.

6 MR. COZEN: Steve Cozen, Cozen, O'Connor, for the
7 plaintiffs' executive committee, your Honors.

8 JUDGE DANIELS: Good morning.

9 MR. STRONG: Bruce Strong from Anderson Kill on behalf
10 the PEC, the O'Neill plaintiffs and the putative class.

11 JUDGE DANIELS: Good morning.

12 MR. HAEFELE: Your Honors, Robert Haefele from Motley
13 Rice here for the Burnett plaintiffs and the plaintiffs'
14 executive committee.

15 MR. TARBUTTON: Good morning, your Honors. Scott
16 Tarbutton from Cozen, O'Connor for the PEC.

17 JUDGE DANIELS: Morning.

18 MR. KELLOGG: Morning, your Honors. Michael Kellogg
19 on behalf of Saudi Arabia.

20 JUDGE DANIELS: Morning.

21 MR. RAPAWY: Good morning, your Honors. Gregory
22 Rapawy, also for Saudi Arabia.

23 JUDGE DANIELS: Morning.

24 MR. ENGLERT: Good morning, your Honors. Roy Englert
25 on behalf of the Saudi High Commission for Relief of Bosnia and

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Herzegovina.

JUDGE DANIELS: Morning.

MR. AZEEZ: Good morning, your Honors Lukman Azeez for the Saudi High Commission for Relief of Bosnia and Herzegovina.

JUDGE DANIELS: Good morning.

So, Mr. Kellogg, am I going to hear from you first?

MR. KELLOGG: Yes, your Honor. Thank you, Judge Daniels, Magistrate Judge Netburn. May it please the Court. At the Court's request, I prepared a binder of materials to which I'll be referring. With the Court's permission, I'll hand up copies of those.

JUDGE DANIELS: Hand them to my law clerk.

MR. KELLOGG: I have only one main point that I want to make this morning, and that is neither JASTA nor plaintiffs' additions to the record, has done anything to call into question the correctness of this Court's 2015 decision dismissing the allegations against Saudi Arabia for lack of subject matter jurisdiction.

The Court in that ruling made three core holdings: First, that plaintiffs had failed to properly allege or present evidence that any individuals acting within the scope of their employment for Saudi Arabia had purposely aided the hijackers.

Second, that plaintiffs failed to properly allege or present evidence that any of those charities that plaintiffs have accused of aiding Al Qaeda were alter egos of Saudi

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1 Arabia.

2 And, third, that plaintiffs were not entitled to
3 jurisdictional discovery because they had failed to put forward
4 a prima facie case that the Court had jurisdiction or to
5 identify any relevant disputed issue on which discovery would
6 make plaintiffs, or the Court, more knowledgeable.

7 All three of those conclusions are equally valid
8 today. JASTA, of course, created a new exception to sovereign
9 immunity. There is no whole tort requirement, there's no
10 discretionary function exception, and there's no requirement
11 that the defendant be designated as a state-sponsored
12 terrorist.

13 So one might have expected that, on remand, the
14 plaintiffs would introduce record evidence designed to take
15 advantage of those changes in the statute by, for example,
16 focusing on actions outside the United States taken by Saudi
17 employees, or by introducing direct evidence of Saudi
18 involvement in the 9/11 attacks, or at least identifying
19 specific factual disputes that might be resolved through
20 targeted jurisdiction discovery. And, yet, they have done none
21 of those things.

22 Instead, they have doubled down on the allegations and
23 the record materials that this Court rightly found inadequate
24 the last time around. Their whole pitch seems to be that JASTA
25 itself is enough to get them over the line and to establish

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1 jurisdiction, but that is clearly not the case. The
2 requirements for JASTA's new exception are clear from its text,
3 which is set out in Tab 1 of the binder that I provided, and it
4 focuses on three requirements. This is in 1605B(b)(2).

5 First, there has to be an act committed by the foreign
6 state or by an official or employee or agent of the foreign
7 state while acting within the scope of his or her office,
8 employment or agency. Now, as individuals, that is the same
9 test the Court previously applied in dismissing allegations
10 about Bayoumi and others because their alleged actions were not
11 within the scope of employment.

12 And as to charities, it's the same test under the
13 Bancec line of cases, which say that day-to-day control is
14 needed to establish a principal-agent relation with an agency
15 or instrumentality.

16 Now, the second requirement of the new JASTA exception
17 is that the act must be tortious. For present purposes, that
18 comes down to an act of providing material support for the
19 terrorist organization that perpetrated the 9/11 attacks, and
20 that support, as this Court and the Court of Appeals have held,
21 must be provided with knowledge or deliberate indifference to
22 the commission of the terrorist acts. And the third
23 requirement of JASTA is that the injuries for which the
24 plaintiffs seek relief must be caused by the act.

25 All three of these elements have to be established

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1 before the Court asserts jurisdiction. That is the teaching of
2 the recent Supreme Court in Helmerich & Payne case, that the
3 jurisdictional requirements must be met in advance of the
4 exercise of jurisdiction. And it is as true today as it was
5 three years ago, that plaintiffs cannot meet that burden.

6 It's important to recognize that JASTA did not change
7 the procedural framework for FSIA cases, which the Second
8 Circuit has affirmed, even in cases since the Court's last
9 ruling, plaintiffs must make plausible, concrete allegations
10 and come forward with competent evidence to establish an
11 exception to immunity. Conclusions, speculation, hearsay are
12 not enough, even if so-called experts endorse them. That's
13 clear under the older Second Circuit cases, like Virtual
14 Counties, Robinson v. Malaysia, as well as the more recent
15 cases of Arch Trading and Vera.

16 The plaintiffs have submitted 4,000 pages of materials
17 to this Court, but there are no significant facts or evidence
18 in those materials. They're largely the same allegations that
19 the Court saw the last time, and they still rest on allegations
20 rejected by the 9/11 Commission, by the FBI, by the CIA and by
21 the 9/11 Review Commission.

22 So with the Court's permission, I'm going to talk
23 briefly about the record, the admissible and the inadmissible
24 material, explain why the evidence and the allegations against
25 the individuals are insufficient, and then do the same for the

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1 allegations in evidence about the charities. And I'll finish
2 with a discussion of why jurisdictional discovery is not
3 warranted.

4 The only significant items of admissible evidence
5 before the Court are the final reports of the 9/11 Commission,
6 the FBI and the CIA report and the 9/11 Review Commission
7 report. Under Federal Rule of Evidence 803(8)(A)(iii), those
8 reports are admissible as evidence if the findings are true
9 because they are, quote, records or statements of public
10 offices that set out factual findings from legally authorized
11 investigations.

12 Each of those investigations was legally authorized.
13 They set out their factual findings based on exhaustive review
14 of the evidence. The reports are presumably trustworthy, and
15 it would be the plaintiffs' burden to show otherwise. The
16 consolidated amended complaint, the plaintiffs have made no
17 effort to show they are not trustworthy. In fact, they relied
18 on them themselves. The Ashton plaintiffs have not, in a
19 serious way, tried to attack the credibility of either the
20 Commission, the FBI, the CIA or the 9/11 Review Commission.

21 So I'd like, if I may, to walk through some of the key
22 findings. First, with the 9/11 Commission report, which is at
23 Tab 2 of your binder. This was in July of 2004, and among the
24 key findings of the Commission are that there was, quote, no
25 evidence that the Saudi government, as an institution, or

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1 senior Saudi officials individually funded Al Qaeda, and there
2 was no evidence that any foreign government, or foreign
3 government official, supplied any funding for the 9/11 plot
4 itself.

5 As to individuals, the Commission found no credible
6 evidence that Omar al Bayoumi or Thumairy or Basnan engaged in
7 any activity -- knowing activity within the scope of their
8 employment to aid the 9/11 attacks.

9 JUDGE DANIELS: Well, those are the conclusionary
10 determinations. The two of you seem to be arguing past each
11 other on this issue. Those conclusions are based on facts --

12 MR. KELLOGG: Correct.

13 JUDGE DANIELS: -- or lack of facts. So the question
14 really is, given the facts that they want to attempt to allege,
15 and the conduct and the actions by these individuals and by
16 officials of Saudi Arabia, what facts do you say that they
17 allege that the report finds that those facts are not plausible
18 or true?

19 MR. KELLOGG: Well, they don't actually allege facts
20 Bayoumi, Thumairy, Basnan and the other. They make a number of
21 conclusionary allegations. For example --

22 JUDGE DANIELS: Well, they do have some facts. They
23 start with basic facts. They say that they were at the same
24 place at the same time in California.

25 MR. KELLOGG: Right.

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1 JUDGE DANIELS: Now, whether that is strong or weak
2 evidence to support their claim, those kinds of facts are the
3 facts that will either lead to the conclusion that there is
4 sufficient evidence of involvement, or lead to the conclusion
5 that those facts, whether they're either not true or those
6 facts, even if true, do not support a plausible claim for
7 liability.

8 So I'm not quite sure what I'm supposed to do with the
9 report's ultimate conclusion, as opposed to the facts that both
10 sides are arguing about as to whether or not they are to be
11 accepted, not accepted, and whether or not they're sufficient,
12 too weak still for this Court to independently reach those
13 conclusions.

14 MR. KELLOGG: Understood, your Honor. First, I would
15 point out that the Supreme Court in the Beech Aircraft decision
16 made it clear that conclusions and opinions are admissible in
17 the context of a trustworthy investigative report. In other
18 words, the findings and conclusions that the 9/11 Commission
19 are acceptable as evidence.

20 JUDGE DANIELS: But they're not determinative.

21 MR. KELLOGG: They are not determinative. Certainly
22 if the plaintiffs were to come forward with additional evidence
23 not before the 9/11 Commission that show the contrary, then
24 they are free to do that. Our point is that they have not done
25 that. They have concluded conclusionary allegations, for

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1 example, about Bayoumi, that he was an employee of Saudi Arabia
2 tasked with aiding the hijackers, knowing that they were
3 planning to commit some sort of terrorist attack in the United
4 States. They have absolutely nothing in the way of evidence to
5 support that.

6 JUDGE DANIELS: All right.

7 MR. KELLOGG: As I noted, the burden of persuasion
8 under JASTA has not changed. They have the obligation to come
9 forward with concrete, specific, not conclusionary, allegations
10 and supporting those allegations with evidence.

11 Now, the 9/11 Commission looked at all of that. They
12 relied on 2.5 million documents. They interviewed more than
13 1,200 people, and they were culling an FBI investigation that
14 explored 500,000 leads and conducted 167,000 interviews. So
15 when the 9/11 Commission says we've got no evidence, we found
16 no evidence that Bayoumi was a supporter of radical terrorism
17 or that he did anything to aid the hijackers in support of the
18 attacks, that is very powerful evidence for this Court.

19 And plaintiffs have come back with nothing on the
20 other side, aside from generalized allegations and so-called
21 expert reports that are really just conduits for hearsay from
22 preliminary materials that do not constitute evidence before
23 this Court.

24 I can walk through the same allegations for Thumairy,
25 for Basnan, for each of the eight individuals, and I will, in

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1 fact, walk through those. But I would like to stress that the
2 9/11 Commission report, including its conclusions, certainly
3 its narrative summary but including its conclusions is
4 legitimate evidence before this Court.

5 And the same holds true of the FBI/CIA report because
6 there was some matters that the 9/11 Commission asked the FBI
7 to conduct further investigation, which they did. And the FBI
8 came back the following year, the FBI and the CIA, with their
9 own report saying that there was no evidence that the Saudi
10 government knowingly provided support for the attacks on
11 September 11, 2001, or had foreknowledge of the terrorist
12 operations.

13 Again, given the exhaustive nature of the inquiry, the
14 fact that they found no evidence is quite compelling evidence
15 in and of itself.

16 JUDGE DANIELS: Well, finding no evidence is not as
17 compelling as a finding of contrary evidence.

18 MR. KELLOGG: Well, your Honor, philosophers will say
19 you can't prove a negative.

20 JUDGE DANIELS: You can prove a negative. I don't
21 agree with that. You can prove a negative. If someone said
22 that you were in California today, I can prove that negative.

23 MR. KELLOGG: Correct.

24 JUDGE DANIELS: So I'm not sure what you mean by that.

25 MR. KELLOGG: For example, they're alleging, without

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1 any basis for doing so, that Bayoumi -- if you recall, last
2 time around they claimed he was an agent of Saudi intelligence.
3 Now they're claiming he's an agent of the Administrative
4 Islamic Affairs. They have absolutely zero evidence to support
5 that.

6 JUDGE DANIELS: But I don't have any specific factual
7 analysis in the report on that particular point.

8 MR. KELLOGG: Oh, you do, actually, because they go
9 through Bayoumi's history in the narrative, and they explain
10 that he was a student studying there. He had been an employee
11 of the Department of Civil Aviation in Saudi Arabia. He was
12 then seconded to Dallah Avco in the United States. His salary
13 was still paid indirectly by the Civil Aviation to allow him to
14 pursue his studies in California, and that that's what he was
15 doing. And --

16 JUDGE DANIELS: Well, that would be true whether or
17 not he isn't otherwise an agent for the Saudi government.

18 MR. KELLOGG: Right, but the plaintiffs have the
19 obligation to come forward with concrete evidence to support
20 that allegation.

21 JUDGE DANIELS: Well, that seems to be the more
22 important point. I mean, in most of these factual
23 determinations, I don't hear you saying that you're identifying
24 in the report contrary evidence to refute their allegations.
25 You're pointing to a lack of evidence in the report to support

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1 such an allegation.

2 MR. KELLOGG: Well, I don't want to quibble, but I'm
3 really doing both. I'm saying that the evidence they gathered
4 indicated that Bayoumi was not an intelligence agent. They
5 even concluded that he was an unlikely candidate for Islamic
6 extremism, that he was pursuing studies, that he was not a
7 witting helper of the hijackers. Those are affirmative
8 findings by the 9/11 Commission, which were then repeated by
9 the FBI/CIA report in 2005.

10 And then the 9/11 Review Commission, in March of 2015,
11 again reviewed all of the evidence since that time to see if
12 anything changed and, again, said that Bayoumi, Thumairy did
13 not provide witting assistance. They were not tasked to help
14 the hijackers and that, again, that Saudi Arabia was not either
15 funded directly nor indirectly the attacks. So I think we do
16 have positive evidence, and the fact that they have zero
17 evidence on the other side, zero admissible evidence, ought to
18 be dispositive.

19 JUDGE DANIELS: Well, I'm not sure that it is a
20 distinction to be drawn, but it seems to me that saying that
21 they found no evidence is a little different than saying that
22 there's evidence that it is not the case.

23 MR. KELLOGG: Well, your Honor, given the exhaustive
24 nature of the investigation, given the fact that they stated a
25 number of their findings in affirmative terms, i.e. that

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1 Bayoumi was an unlikely candidate for clandestine activity,
2 that he was a student, that he did not wittingly assist the
3 hijackers.

4 JUDGE DANIELS: Those are conclusionary statements.
5 That he did not wittingly assist the hijackers, that's based on
6 facts; that is not a fact. That is a conclusion.

7 MR. KELLOGG: It is a conclusion drawn after an
8 exhaustive review of the facts, which I think, under Beech
9 Aircraft is considered a legitimate source of evidence before
10 the Court.

11 JUDGE DANIELS: Sure. But when you say it's based on
12 exhaustive facts, well, those facts are what I think we ought
13 to be discussing, you know, not the conclusion. But what are
14 the facts on which they claim that the evidence demonstrates
15 that he was an unwitting participant?

16 MR. KELLOGG: All right. Why don't I walk through the
17 specifics of the eight individuals that they allege were agents
18 of Saudi Arabia, supporting the attack. There are eight of
19 them.

20 Four of them were already considered by this Court in
21 its prior opinion, and only one of them, Fakihi, is affected at
22 all by JASTA because he was outside of the country in Germany.

23 So the first two al Bayoumi and al Thumairy are the
24 main focus, as they were in the past. This Court, as I noted,
25 has already rejected the substance of plaintiffs' allegations

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1 about al Bayoumi, and the same allegations, as I noted, were
2 considered and rejected by the Commission, the FBI, the CIA and
3 the 9/11 Review. And the only attempt to come up with
4 something new about al Bayoumi is from supporting affidavits
5 and opinions of former FBI agents and from Senator Graham.

6 You'll recall Senator Graham put in a declaration the
7 last time and the Court said, rightly, that that was not
8 evidence. It was just his opinion, and he's entitled to
9 disagree with the 9/11 Commission, but his personal agreement
10 or disagreement is not relevant evidence. And the same is true
11 of the various FBI reports and declarations, where they take
12 issue -- they were part of the investigation, but they take
13 issue with the ultimate conclusions. Their decisions or their
14 beliefs do not constitute evidence.

15 Take, for example, Agent Moore, he does not claim to
16 be a percipient witness of any of the issues he discusses. He
17 does not claim to be an expert on terrorism, he's simply
18 stating his personal beliefs, which do not constitute evidence
19 before this Court.

20 JUDGE DANIELS: Well, how is that different than your
21 reliance on the Commission?

22 MR. KELLOGG: Oh, there's a very strong difference
23 because the Commission report is the finding of a -- formal
24 findings of a commission that was charged to investigate and
25 report on the matter.

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1 JUDGE DANIELS: As opposed to the finding of an FBI
2 agent who individually did the investigation?

3 MR. KELLOGG: No, because the individual FBI agent,
4 who's relying, for example, on interview memos or preliminary
5 investigation memoranda, which the Second Circuit has made
6 clear are not admissible materials because they are hearsay in
7 the *City of New York v. Fulman* case and other cases we cite in
8 our reply brief at 17 and 18, such materials are not considered
9 admissible and that's true, for example, of the 28 pages from
10 the joint inquiry, which is the only new material that was
11 declassified after this Court's decision.

12 JUDGE DANIELS: But isn't that primarily the evidence
13 that the commissions relied upon, those investigations and
14 reports by federal agencies?

15 MR. KELLOGG: The joint inquiry of 2002, which was
16 very close after the 9/11 attacks, was an attempt to gather a
17 summary --

18 JUDGE DANIELS: Right.

19 MR. KELLOGG: -- of the various investigative leads
20 being followed up.

21 JUDGE DANIELS: Including FBI investigations and FBI
22 reports that you say independently should not be relied on.

23 MR. KELLOGG: Well, I'm saying that the joint inquiry
24 report does not contain formal findings. In fact, they
25 specifically disclaim that. At 4, 16 they say the joint

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1 inquiries did not attempt to investigate and assess the
2 accuracy of this information independently. Instead, the joint
3 inquiry referred the information it uncovered to the FBI and
4 the CIA for further investigation.

5 Then they stress it should be clear that the joint
6 inquiry has made no findings or determination as to the
7 reliability or sufficiency of the information regarding these
8 issues. Then they say it's possible that further investigation
9 could reveal more data. And, in fact, that's what happened
10 because they kicked this to the 9/11 Commission, and they
11 kicked this to the FBI and the CIA, who issued their report.
12 And the result of their findings was that there was not an
13 adequate basis for suggesting that Bayoumi, Thumairy, Basnan
14 and the others had any witting role in the 9/11 case.

15 JUDGE DANIELS: What I'm trying to concentrate on is
16 what do you say that the 9/11 Commission had that the other
17 investigative bodies or entities didn't have that you say is
18 compelling to rely separately on the Commission's ultimate
19 approval.

20 MR. KELLOGG: Obviously, they had access to most of
21 these same materials.

22 JUDGE DANIELS: Right.

23 MR. KELLOGG: And my point is that investigative
24 memoranda, where an agent goes and says I went and spoke with
25 such and such a person who said he thought that Bayoumi was a

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1 spy.

2 JUDGE DANIELS: Right.

3 MR. KELLOGG: That is not, in itself, evidence.

4 JUDGE DANIELS: But if the Commission relies on a
5 conclusion by an agent who said, I find that he wasn't a spy,
6 why is the Commission's conclusion, based on that same type of
7 evidence, somehow more compelling?

8 MR. KELLOGG: Well, it is because the 9/11 Commission
9 was specifically charged with taking all of this mass of
10 material and trying to make sense of it and draw reasonable
11 conclusions from it. It was not part of the individual FBI
12 agent's job to issue findings or draw conclusions. There were
13 thousands of FBI agents all over this case. As I said, they
14 interviewed 167,000 people. They followed more than half a
15 million leads. You can imagine that, among these thousands of
16 agents, lots of them had their own views.

17 But the point is, under the federal rules of evidence,
18 that when a body is charged with sorting through this material
19 and reaching formal findings and conclusions, as the 9/11
20 Commission did, as the FBI and the CIA did and as the 9/11
21 Review Commission did, that those are to be given special
22 weight in court that a mere hearsay memoranda reporting a
23 single, isolated interview does not.

24 JUDGE DANIELS: Well, again, it depends on what those
25 findings are based on, and I'm sure you're not arguing that

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1 those findings are determinative.

2 MR. KELLOGG: I'm not arguing that they're
3 determinative, but I am arguing that they're evidence. And I'm
4 also arguing that the plaintiffs have no admissible evidence to
5 set against those findings. And, frankly, that itself is
6 enough to defeat their case because they have the burden of
7 coming forward with actual evidence to show that the JASTA
8 requirements have been met, to show that somebody, acting
9 within the scope of their employment, committed a tort of
10 aiding and abetting the hijackers, and they cannot do that.
11 They could not do that three years ago when this Court reviewed
12 the record, and nothing that they've added since then can do
13 so.

14 You know, the only thing really that they've added
15 about Bayoumi -- there's two things I should mention, what's
16 called the Florida Bulldog memorandum, which was a 2012 -- I
17 believe it was 2012 document. It was a status update of the
18 ongoing investigation from an FBI agent. It described what
19 they, quote, sought to prove, which, of course, is not an
20 indication that they have proved it, but it's seeking to prove
21 and not evidence of anything itself.

22 And in that memorandum, they suggest that some unknown
23 person, who is redacted, who tasked Thumairy and Bayoumi with
24 helping the hijackers. Well, the 9/11 Commission considered
25 that, but nonetheless concluded, based on the full

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1 investigation, that al Thumairy and al Bayoumi did not aid the
2 hijackers, and there was no unknown person who tasked them to
3 do so.

4 Now, they get an FBI agent, former FBI agent, to say,
5 well, I see that redacted tasked them, my conclusion is that
6 whoever tasked them must have been a Saudi agent. He must have
7 been doing it on behalf of the Saudi government and, therefore,
8 the Saudi government is responsible for the 9/11 attacks.
9 Well, that's just utter nonsense. That chain of reasoning does
10 not follow at all. The fact that they can find a former FBI
11 agent to endorse that chain of reason has no bearing on this
12 case at all.

13 Indeed, on Bayoumi, really aside from the Florida
14 Bulldog memo, what they add is two FBI agents talking about
15 spycraft and tradecraft, and suggesting that everything Bayoumi
16 did was suspicious, including taking occasional trips home,
17 going to the embassy to get his passport -- his visa renewed
18 and stopping to get his photo taken for a passport photo before
19 doing so.

20 One of them says, well, he got lost on the way to the
21 restaurant where he was meeting the hijackers, and the other
22 said, no, he was doing a surveillance detection unit. One of
23 them says, oh, he didn't call the embassy very often;
24 therefore, he was engaging in spycraft, which means that he
25 didn't want to expose his contacts with the embassy. The other

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1 said he called the embassy a bunch of times; that shows that he
2 was a covert agent.

3 None of this stuff constitutes proper, legitimate
4 evidence of any wrongdoing by any of these individuals, much
5 less that they were doing something pursuant to instructions
6 from Saudi Arabia as part of the scope of their employment.

7 Now, I said, as I noted, they shifted now and said,
8 rather than saying Bayoumi was an intelligence agent, they said
9 he was a member of the ministry of Islamic affairs. And,
10 really, you know, plaintiffs are repeatedly trying to paint
11 Islam itself as a form of terrorism. There are about two
12 million Muslims in the world who peacefully follow their faith,
13 and plaintiffs are constantly throwing disparaging references
14 to Wahhabism and Dawah organizations and radical Islam, and the
15 attempt to draw inferences from Islamic missionary work, the
16 building of mosques, the provision of Qur'ans to terrorism, and
17 that is not evidence and it's not proper in this court.

18 For example, Mr. Rockford really substitutes vitreal
19 for evidence, where Bayoumi is concerned. He says, quote, at
20 Page 19 of his affidavit: Thumairy and Bayoumi were steeped in
21 the jihadist violence and anti-American Wahhabist agenda, the
22 ministry of Islamic affairs is dedicated to advance globally."
23 He has no basis for saying that. He's not an expert in Islam
24 or the ministry of foreign affairs.

25 Saudi Arabia publicly condemned and said that Islamic

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1 law precludes terrorism long before the 9/11 attacks. They had
2 expelled Osama bin Laden in 1994 from the Kingdom and revoked
3 his passport. They, themselves, were the victims of Al Qaeda
4 attacks starting in 1995. The idea that Saudi Arabia was
5 endorsing Islamic terrorism by Al Qaeda has no basis in this
6 record whatsoever.

7 The allegations against Thumairy are also
8 conclusionary and stand substantially on the allegations
9 against Bayoumi. They really don't have anything, other than
10 he was an imam, he worked for the Ministry of Islamic Affairs,
11 and he met with Bayoumi. And from that, they draw the story
12 that we now have evidence that he aided and abetted
13 deliberately the 9/11 attacks.

14 A third individual is Basnan, Osama Basnan. They have
15 nothing to indicate that he's an employee of Saudi Arabia at
16 all, nothing that he did to help the hijackers, and no material
17 change from the record that was before this Court the last
18 time. Again, their FBI agent, Rockford, says, at 21: In my
19 professional opinion, Basnan played, quote, some as yet
20 unidentified role in the 9/11 attacks. That's evidence? That
21 kind of speculation, without any concrete details to back it
22 up?

23 The Court rightly dismissed all three of those the
24 last time, as it did with Saleh Al Hussayen, where again,
25 there's no plausible allegation that he was an official of

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1 Saudi Arabia at all. They cite one report indicating that he
2 became a minister sometime after the 9/11 attacks, but at the
3 time of the 9/11 attacks, there's no indication that he did
4 anything to help the hijackers.

5 All they rely on is two newspaper articles that they
6 claim show he changed hotels to stay with the hijackers the
7 night before the 9/11 attacks. But those newspaper articles
8 don't even say that, and none of their experts discuss -- their
9 so-called experts even discuss Hussayen.

10 The fifth and the sixth are Al Qudhaieen and Al
11 Shalawi, who they claim conducted a dry run of the 2001 attacks
12 back in 1999 when one of them tried to open the door to the
13 cockpit, and they were questioned by the FBI. The FBI, there's
14 at least one place, speculated that it might have been a dry
15 run for the 9/11 attacks. But there's no allegation that they
16 were employed by Saudi Arabia in any capacity. They were
17 students. They had a stipend to study over here, and they were
18 headed to a conference sponsored by Saudi Arabia. But there's
19 no indication that they had any employee relations. And the
20 dry run speculation was known to and investigated by the 9/11
21 Commission. It's dealt with in the 9/11 report at 521, note
22 60, but it never went anywhere. There's no basis on which
23 that's been developed.

24 So the seventh is the one in Germany, in Frankfort,
25 Mohammed Jabar Fakihi. He was a payroll accountant at the

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1 embassy in Germany, whose job it was to write checks, and they
2 claimed that he's alleged to have diverted funds to suspect
3 charities. The allegations are wholly conclusory. There's no
4 allegation even that the fund transfer happened before the 9/11
5 attacks, and there's no allegation that even if he did divert
6 any funds, that that was within the scope of his duties at the
7 embassy.

8 So, finally, there's Omar Abdi Mohamed, who's not a
9 defendant here. Neither are the two supposed dry run hijackers
10 defendants here. The consolidated amended complaint don't even
11 mention him in their opposition brief. The Ashton plaintiffs
12 do so only very briefly. They accuse him of money laundering,
13 but he was not charged with any such thing. He was charged
14 with visa fraud because he didn't explain, disclose that he was
15 paid by Saudi Arabia to act as a propagator of Islamic beliefs,
16 that is a missionary.

17 But the allegations that he was a money launderer are
18 based solely on an allegation that he once transferred money
19 using Dahab Shil, which is a legitimate money transfer service
20 that is also allegedly used by Al Qaeda members. And so the
21 contention is that sending money through Dahab Shil supports an
22 inference of sending money to Al Qaeda, which does not follow
23 at all. It's completely unsupported in the record.

24 So those are the eight individuals that they claim
25 were agents of Saudi Arabia, employees of Saudi Arabia, who

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1 within the scope of their employment aided and abetted the 9/11
2 attacks. To repeat, there is simply no evidence to support
3 that. Whatever allegations they have are wholly conclusory
4 and based on inadmissible materials.

5 So I'll turn, if I might, to the charities. There's
6 seven main charities named in the two complaints as purported
7 alter egos of Saudi Arabia that supposedly funded Al Qaeda.
8 The Court dealt with these issues before and found no evidence,
9 no support for the allegations that these were alter ego of the
10 Kingdom under the Bancec test line of cases, which has been
11 further fortified by the Second Circuit in more recent Arch
12 Trading case and the Vera case.

13 So they have five different theories now as to why
14 Saudi Arabia is responsible for the actions of the charities,
15 but despite the multiplication of theories, the real governing
16 standard here is the same one that the Court applied the last
17 time, the Bancec day-to-day controls and the relevant
18 allegations have not significantly changed.

19 This Court previously rejected the declaration of Evan
20 Coleman, who pulled together a lot of hearsay and general
21 allegations about these charities, and then purported to
22 conclude that they were alter egos of the Kingdom. And the
23 Court found that the material was unreliable, duplicative,
24 inadmissible and did not support that conclusion.

25 He's put in a new affidavit. It's a little longer.

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1 It's basically the same, a lot of these same recycled materials
2 with additional conclusions about control. And we've shown you
3 detail in our reply brief that the allegations are not
4 materially different from what the Court heard the last time.

5 So plaintiffs' first theory is the day-to-day control,
6 which they have not supported. The second theory is that they
7 were agents of Saudi Arabia under the agency standard
8 incorporated in JASTA, but that's legally incorrect because
9 Bancec itself incorporated an agency standard that in common
10 law calling corporate subsidiary an agent of a parent company
11 requires the same showing to pierce the corporate veil, and
12 Bancec takes that principle and applies it to governmental
13 agencies and instrumentalities, as does the Second Circuit in
14 EM Limited and the Arch Trading case.

15 Plaintiffs' theory is also factually wrong because
16 even if they say the charity was an agent, they can't point to
17 anything, authorization by Saudi Arabia to the charities or the
18 charities to support charities on their behalf, which is what
19 they would have to show under an agency theory.

20 The third theory is that the charities are performing
21 core functions of the Saudi state, and again, we're sort of
22 back to the attacks in Islam. Kingdom of Saudi Arabia is an
23 Islamic state and religion is very important to them. They do
24 promote Islam. They do build mosques. They do send out
25 Qur'ans, et cetera, but to call alleged charities who are

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1 diverting money to Al Qaeda so that it can attack the United
2 States and the Kingdom itself, of course, that that is a core
3 function of the State relies on a serious misreading of the
4 Second Circuit's decision in the Garb case, which involved the
5 Polish ministry of the treasury.

6 Garb was based on findings that the treasury didn't
7 hold properly separately from the Polish state, that it was an
8 arm of the Polish state. It did not announce some
9 freestanding, freewheeling core function that would apply to,
10 for example, religious propagation.

11 Plaintiffs' fourth theory, which contradicts their
12 other, is that the charities themselves were Al Qaeda fronts;
13 so that giving money to them was the same thing as giving it to
14 Al Qaeda. That theory was not fairly raised in the
15 consolidated amended complaint. Regardless, the assertion that
16 they were Al Qaeda fronts is completely inconsistent with the
17 argument that the charities are agencies and instrumentalities
18 of Saudi Arabia, much less alter egos and agents.

19 And there is no basis -- if I may repeat, the 9/11
20 Commission's findings that there is no reason to believe that
21 Saudi Arabia directly supported Al Qaeda generally or the 9/11
22 attacks in particular, and plaintiffs have come up with no
23 information to the contrary.

24 So their fifth and last theories is that because the
25 charities were headed by Saudi officials, that means everything

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1 they did was acting on behalf of Saudi Arabia including when
2 they purportedly diverted funds to Al Qaeda. There's no
3 plausible evidence or allegations where Saudi Arabian officials
4 were involved in any of the alleged diversion of funds to Al
5 Qaeda.

6 So even if some of these charities did divert funds,
7 there is no evidence or allegations that would attribute that
8 to the Kingdom itself. Even if some isolated official was
9 responsible at a charity for diverting funds, there's no
10 relevant allegations or admissible evidence that that was
11 acting within the scope of their employment or agency on behalf
12 of Al Qaeda.

13 (Continued on next page)

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1 MR. KELLOGG: I walked through the individuals. I
2 walked through the charities. Now I want to discuss why there
3 is no basis for jurisdiction of discovery as this court
4 concluded the last time.

5 What the court explained is that plaintiffs had not
6 established the prima facie case. That has not changed. This
7 court also stated at the last hearing that plaintiffs had not
8 shown that they would likely find anything that the 9/11
9 Commission had missed or that would otherwise establish
10 jurisdiction. That has not changed either. If anything, the
11 law on this has gotten even stronger, and the limited case in
12 the Second Circuit said, before you even get jurisdictional
13 discovery, you must show a reasonable basis for assuming
14 jurisdiction, and this is evident in arts training, a
15 nonspeculative reason for believing that discovery would reveal
16 "details that would establish jurisdiction." They have done
17 none of that.

18 The last time, of course, they didn't really ask for
19 any discovery except in a single footnote. They said if there
20 are any issues that facts were disputable, please give us
21 discovery. They have gone to the opposite extreme this time
22 and asked for everything possible in lengthy requests for
23 documents in other words.

24 They basically have asked for documents on every
25 possible topic for discovery covering every Saudi Arabian

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1 ministry, agency, embassy or consulate anywhere in the world
2 from 1992 through 2004. I would submit to the court that that
3 is pretty much the equivalent of the footnote that they put in
4 the last time that said, well, any discovery would be helpful.
5 We would like it. But it is not any attempt to bear their
6 burden of identifying specific details that would allow them to
7 make their jurisdictional case. Even to get there, they have
8 to, as this court noted, establish a prima facie case of
9 jurisdiction, which they have failed to do.

10 Unless the court has further questions, I'll reserve
11 my time.

12 JUDGE DANIELS: Thank you.

13 MR. ENGLERT: Good morning, your Honor. Like
14 Mr. Kellogg, I have something for the court. May I approach?

15 JUDGE DANIELS: Yes.

16 MR. ENGLERT: I am Roy Englert and I represent the
17 Saudi High Commission for Relief in Bosnia and Herzegovina. I
18 plan to speak for only about five minutes and I am going to
19 stick to facts.

20 My client should not be here and should never have
21 been here. It is a legitimate humanitarian organization headed
22 by former Prince, now King, Salman. In 2004, when this case
23 was pending before the late Judge Casey, we submitted the
24 affidavit of Mr. Al-Roshood explaining in considerable detail
25 what the Saudi High Commission is, what it does, and how it has

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1 been audited by the Bosnian financial police. That is tab 16
2 of the binder I handed up.

3 The organization was going strong, although it was
4 winding down its affairs in 2004 when Mr. Al-Roshood signed his
5 declaration.

6 MR. CARTER: I'm sorry, your Honor. We didn't receive
7 a copy of the binder. We are not following.

8 MR. ENGLERT: I apologize.

9 JUDGE DANIELS: Sure.

10 To repeat, the declaration is tab 16 in that binder.
11 It was submitted to the late Judge Casey in 2004.

12 As Mr. Al-Roshood explains, the Saudi High Commission
13 was formed during the Bosnian war in the early to mid 90s, was
14 still going as of 2004 when he submitted his declaration, but
15 was winding down its affairs.

16 In paragraph 13 of that declaration, he explains the
17 result of an audit by the Bosnian financial police. Although
18 it is not in the binder, Exhibit 3 to his declaration was the
19 audit in great detail.

20 Now, in our moving papers and again in our reply, we
21 characterized plaintiffs as having made three kinds of
22 allegations against my client: Guilt by association, remote in
23 time and place, and conclusory and unsubstantiated. Let me
24 give an example of each.

25 In tab 11 of your binder is a cable from the Embassy

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1 in Sarajevo to the state department in Washington dated
2 June 11, 2002. It is the so-called dirty dozen cable which
3 names 12 Islamic charities operating in Bosnia that the
4 financial police had some doubts about.

5 We answered that evidence with Mr. Al-Roshood's
6 declaration, which explained that whatever doubts the Bosnian
7 financial police might want to have, they conducted an audit
8 and they found nothing wrong with the expenditures of the
9 Saudi High Commission. Again, that is paragraph 13 of
10 Mr. Al-Roshood's affidavit at tab 16. Also what is not in the
11 binder, Exhibit 3 to Mr. Al-Roshood's affidavit.

12 As to allegations remote in time and place from
13 September 11, 2001, an excellent example in tab 8 of your
14 binder, which is the witness statement of Mr. Hammad and the
15 recent submission by Mr. Kreindler of your letter of
16 January 12, 2018, to this court providing further elaboration
17 on what Mr. Hammad said.

18 This is plaintiffs' best evidence, to be blunt. They
19 have a former Al Qaeda member saying, until I was arrested and
20 jailed in 1997, I had some dirt on the Saudi High Commission.
21 It is not true, but let's assume that everything he said is
22 true. All of it is about what happened in Bosnia up through
23 1997. None of it is about what happened in the United States
24 in 2001. But Mr. Kreindler's January 12 letter contains
25 information not in tab 8, which is followup questions

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1 Mr. Hammad was asked. He was asked if he knew anything about
2 what Al Qaeda was planning to do. And he said, as a matter of
3 fact, I do. Al Qaeda was using its operations in Bosnia to set
4 up additional operations in Europe. Not in the United States,
5 in Europe. This is plaintiffs' best evidence. It says nothing
6 linking Bosnia and that Bosnia mujihadeen to the United States.
7 It does say something linking to Europe, nothing linking him in
8 the United States.

9 The third category of evidence is conclusory and
10 unsubstantiated allegations. Behind tab 5 of your binder is a
11 CIA report dated June 1, 2003. The first substantive page of
12 the CIA report says -- and I am paraphrasing, don't rely on
13 this too much -- we really haven't done much of the
14 investigation we plan to do.

15 I would suggest the document is inadmissible, but
16 let's assume it is admissible. What does that document tell us
17 about two of the 9/11 hijackers? It tells us that two of them
18 fought in Bosnia. It doesn't mention the Saudi High
19 Commission. It doesn't say anything about their role in
20 Bosnia. It just says they fought in Bosnia. Fighting in a war
21 does not make a person the enemy of every country that was not
22 in that war. If the hijackers fought in Bosnia alongside other
23 mujihadeen and if some of mujihadeen were under the sponsorship
24 of the Saudi High Submission, and even if the Saudi High
25 Commission had been infiltrated by Al Qaeda, if we assumed that

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1 all of those things are true, so what? It doesn't have
2 anything to do with the terrorist attacks in New York and
3 Washington and the plane that went down in Pennsylvania in
4 September 11 of 2001.

5 If the court has no further questions, I will rest.

6 JUDGE DANIELS: Thank you.

7 MR. CARTER: We are going to add a few things in light
8 of our presentation.

9 JUDGE DANIELS: Sure.

10 MR. CARTER: Thank you, your Honor. May it please the
11 court.

12 I think I would like to begin by talking a little bit
13 about JASTA because we really do believe that the sort of core
14 folly of the kingdoms and the Saudi High Commission's position
15 and proposed approach for resolving the present motion to
16 dismiss is reflected in one of the first comments Mr. Kellogg
17 made in the first line in the reply brief and suggested that
18 this court should conclude that JASTA has no effect on the
19 outcome of this case.

20 Nothing could be further from the truth. The kingdoms
21 theory is essentially that congress, by enacting JASTA, did
22 nothing to provide the 9/11 families with a better remedy to
23 pursue their claims against the Kingdom and Saudi High
24 Commission aside from removing the entire tour of discretionary
25 functional limitations of the noncommercial torts exception.

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1 Despite both having relied nearly exclusively on those defenses
2 in the earlier proceedings in this litigation, they now
3 implausibly claim that the removal of those is an impediment
4 and has no significance in this litigation.

5 The Kingdom has further suggested that congress
6 somehow embedded in JASTA a whole range, a very onerous
7 substantive liability standard that would make it extremely
8 difficult for plaintiffs in terrorism case to move forward with
9 their cases. In fact, the legislative history, congress'
10 statement of purpose in JASTA, the text and structure of the
11 statute in the broader context in which it was enacted all
12 indicate otherwise.

13 I want to get to some of the particulars of what JASTA
14 did to clear the way for this to go forward. Before doing so,
15 I want to return for a moment to the elimination of the
16 discretionary function and entire tort rules because the
17 significance of that change in the law would be hard to
18 understate, and we believe that that is reflected in the way
19 that the Kingdom itself has tried to sort of pivot its approach
20 to this litigation since JASTA's enactment.

21 As we mentioned in our opposition brief, for many
22 years, the Kingdom and Saudi High Commission worked very hard
23 to try to persuade this court, the Second Circuit, and even the
24 Supreme Court that plaintiffs' claims against them principally
25 arose from the claim that the Kingdom had committed a tort by

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1 channeling money to Al Qaeda through charities thereby
2 providing material support to terrorist. That is actually the
3 language they used and that we quoted.

4 Now, that was never completely accurate because it
5 didn't capture the full scope of the claims that we had
6 asserted, but the Kingdom obviously thought there was a
7 strategic advantage to frame the claims in that way because it
8 served to channel the jurisdictional inquiry into its entire
9 tort and discretionary function defenses.

10 The argument was, essentially, this case is all about
11 us giving money to Al Qaeda through these charities, but that
12 funding all occurred outside the United States and is therefore
13 barred by the entire tort rule. In addition, that funding was
14 part of our broader global Islamic policy and therefore
15 discretionary. As they have to admit now, those defenses have
16 been completely stripped away, and as a result of that,
17 congress has very clearly paved the way for the claims the
18 plaintiffs have asserted against Saudi Arabia for providing
19 material support in the form of funding channeled through its
20 charitable organizations through Al Qaeda. That is a claim
21 that has always gone on the record, the Kingdom has always
22 recognized it is out there, and it is completely clear right
23 now as a result of a removal of the defenses they relied upon.

24 It does not depend at all, your Honor, on any
25 attribution of conduct to another to the Kingdom of Saudi

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1 Arabia. So it doesn't drag anyone down to the weeds of these
2 arguments about agency and whether or not alter ego showing is
3 necessary. That is a claim about an action of the Kingdom of
4 Saudi Arabia itself, constituting material support for
5 terrorism with a direct relationship to the resulting harm in
6 the United States.

7 Indeed, there are ample allegations in the complaint
8 and in the supporting affidavits that the money provided by the
9 Kingdom of Saudi Arabia was the principal source of funding for
10 the Al Qaeda organization during the years leading up to the
11 September 11 attacks.

12 Putting those claims aside just for one minute, I do
13 want to return. The elimination of those two limitations that
14 presented an impediment under the tort exception was by no
15 means all that congress did through JASTA to aid the 9/11
16 plaintiffs in this case. Mr. Kellogg made a number of
17 arguments about what JASTA requires to be proven, and they
18 are in conflict with the text and in conflict with the stated
19 purpose and in conflict with legislative history.

20 JUDGE DANIELS: I want to make sure that I understand
21 exactly what you're articulating. JASTA did not provide a
22 cause of action generally for providing financial support to
23 Al Qaeda?

24 MR. CARTER: Your Honor, JASTA provided an exception
25 to sovereign immunity to allow a claim to proceed.

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1 JUDGE DANIELS: The claim is not providing financial
2 support to Al Qaeda, that is not the claim.

3 MR. CARTER: Well, your Honor --

4 JUDGE DANIELS: The claim is providing financial
5 support for the terrorist acts that were committed on 9/11.

6 MR. CARTER: Your Honor, I don't think that is a
7 correct articulation of what JASTA did. JASTA allows a claim
8 to proceed if it is predicated under tortious act of a foreign
9 state --

10 JUDGE DANIELS: Right.

11 MR. CARTER: -- that can clearly include material
12 support for terrorism.

13 JUDGE DANIELS: What is the tortious act that the
14 material support for terrorism is not the tortious act?

15 MR. CARTER: Your Honor, it is the tortious act, and
16 part of the reason is because JASTA also made available causes
17 of action under the anti-terrorist act.

18 JUDGE DANIELS: But there is a causation requirement
19 under JASTA. I want to make sure that we're not -- it sounds
20 like a simpler analysis, but only because of the way you're
21 articulating. There is still a causation requirement that is
22 related to the injuries and deaths that occurred on 9/11.

23 MR. CARTER: There is a jurisdictional causation
24 requirement embedded in JASTA.

25 JUDGE DANIELS: Without that, there is no cause of

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1 action simply for providing financial support to Al Qaeda
2 generally for their nefarious activity.

3 MR. CARTER: Plaintiff would obviously have to have
4 suffered some harm to bring a claim, that's correct, your
5 Honor.

6 JUDGE DANIELS: The critical point, the two critical
7 points, it is not just whether or not you can establish that
8 they provided financial support to Al Qaeda, but also alleged
9 sufficient facts to establish that providing that financial
10 support was a cause of and was related to the activities on
11 9/11 and caused those injuries and deaths to occur.

12 MR. CARTER: Your Honor, there is a jurisdictional
13 causation element that is a part of pleading the exception to
14 immunity --

15 JUDGE DANIELS: I don't mean to interrupt you. The
16 reason why I am concentrating on that, isn't that really the
17 critical part of this claim and the critical dispute here, is
18 not whether or not that Saudi Arabia is cozy with Al Qaeda, it
19 is whether or not the allegations themselves are sufficient to
20 demonstrate that their provision of financial support to
21 Al Qaeda was a cause and in support of the activity of 9/11?

22 MR. CARTER: Your Honor, the causal link that JASTA
23 requires for purposes of the immunity exception is incredibly
24 modest.

25 JUDGE DANIELS: You define it for me, though, but it

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1 is a requirement. I mean, as they say modest, I don't usually
2 think of legal requirements as being modest or immodest. You
3 have to tell me what you mean by that.

4 MR. CARTER: Your Honor, I think there is a clear way
5 to do that. The lead sponsors of JASTA indicated in the floor
6 statement before the Senate voted, before the House voted, and
7 before the veto overrides, that they were specifically adopting
8 and incorporating into JASTA the interpretations of three
9 principal holdings of the identical cause by language of the
10 state sponsor of terrorism exception. And that exception had
11 been interpreted to merely require, for purposes of
12 jurisdiction, a showing of some reasonable connection between
13 the defendants' tortious act in support of terrorism and the
14 harm plaintiff suffered.

15 Those cases -- Rux, Kilburn, and Owens -- have
16 indicated that the showing of causation and material support
17 for purposes of jurisdiction is lower, much lower than the
18 threshold for proving ultimate liability because the role --

19 JUDGE DANIELS: That is true at this point of any set
20 of allegations in the complaint. I am trying to figure out why
21 you said that the showing with regard to causation is somehow a
22 lesser showing than any other requirement at this stage of the
23 proceeding.

24 MR. CARTER: Your Honor, it is a showing of a
25 reasonable correction, and part of that is because JASTA

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1 incorporated principals of secondary liability. So the
2 standard of causation for purposes of JASTA's jurisdictional
3 standard couldn't be more stringent than any of the underlying
4 substantive cause of action it makes available.

5 JUDGE DANIELS: I understand that, I just don't
6 understand what you say it is less stringent than.

7 MR. CARTER: Well, your Honor, it is clearly less
8 stringent than any of the standards Mr. Kellogg has articulated
9 suggesting it is but-for causation or traditional approximate
10 causation. It is neither of those things.

11 Again, the decisions in Owens, Kilburn, and Rux
12 recognize that this kind of activity in support of a terrorist
13 organization is reasonably connected to the resulted harm.

14 JUDGE NETBURN: Your basis for that position is the
15 fact that the floor statements relied on those particular
16 cases?

17 MR. CARTER: Both because the floor statements
18 specifically incorporated them, those cases and the analyses
19 from those cases said they were adopting the specific causation
20 standard in addition to the overall statement of purpose of
21 congress in enacting JASTA, which was to provide terrorism
22 victims with the broader possible basis of relief to pursue
23 claims against foreign states that had provided material
24 support for terrorism, whether directly or indirectly. In
25 order to honor that central purpose of the statute, the

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1 causation standard authorized for claims to go forward has to
2 be flexible in accommodating to the realities that terrorism
3 victims face.

4 JUDGE NETBURN: Whether there are any other statutes,
5 whether terrorist or other contexts, where the reasonable
6 connection threshold was required as opposed to higher
7 threshold as opposed to a but-for or proximate cause?

8 MR. CARTER: Your Honor, off the top of my head, I
9 can't give you a firm answer on that, but obviously they were
10 very specific and very precise about what they were trying to
11 do here and the language they were incorporating. And it made
12 sense because they were obviously responding to results in this
13 case and they were trying to make sure that the remedy they
14 were crafting was going to be available to these people to
15 assist them in order for their claims to proceed. And
16 incorporating a but-for causation standard would inhibit that
17 result and, in fact, it would more broadly be contrary to U.S.
18 counterterrorism policy, which recognizes, as the Supreme Court
19 did in the Humanitarian Law project, that every contribution of
20 support to a terrorist organization advances its ability to
21 engage in acts of terrorism. Because of that, the relationship
22 between providing material support and resulting harm is
23 apparent by virtue of the terrorism context itself.

24 JUDGE DANIELS: I just want to make sure I understand,
25 as they say, what you want me to do with that. What element of

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1 your claim has a less modest requirement at this stage? I
2 mean, causation is one of the elements of your claim that
3 you're going to have to establish for jurisdiction. What other
4 element of the claim that you say that there is some higher
5 standard that you have to meet? I'm not sure what you want
6 me --

7 MR. CARTER: I understand what you're saying.

8 JUDGE DANIELS: -- to distinguish. You understand?

9 MR. CARTER: For purposes of the underlying aiding and
10 abetting claims, for instance, your Honor, the analysis would
11 turn on whether or not the Kingdom had provided substantial
12 assistance to Al Qaeda, and there is six or so factors that
13 inform that analysis.

14 JUDGE DANIELS: You say that is a higher standard at
15 this point that you must meet than the causation standard?

16 MR. CARTER: No. I am saying the jurisdictional
17 causation standard is clearly lower than that because it has to
18 ensure that a claim won't get kicked out of the jurisdictional
19 phase that could ultimately prevail on the merits. But in
20 terms of the aiding and abetting, and they incorporated in
21 JASTA the standards from Halberstam v. Welch, once you made the
22 showing of substantial assistance, and under Halberstam, where
23 the assistance is provided for particularly appropriate facts,
24 even de minimus assistance can constitute substantial
25 assistance. The wrongdoing party is responsible for all

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1 foreseeable harm. So the reasonable connection foreseeability
2 standard, essentially, work in tandem with one another.

3 JUDGE DANIELS: All right. I still don't understand
4 how that is different than the analysis with regards to what
5 you characterize as a modest showing on causation.

6 MR. CARTER: Your Honor, again, the showing on
7 jurisdictional causation we're advocating is the reasonable
8 connection standard that congress required and adopted from
9 Rux, Owens, and Kilburn, which, again, is much lower to make
10 sure than claims can proceed.

11 JUDGE DANIELS: As I said, much lower than what?

12 MR. CARTER: Well, again, your Honor, I think
13 implicitly reasonable connection is lower than something like
14 traditional proximate cause. The analysis is there a
15 reasonable connection between the wrongful conduct and the
16 resulting harm and, again, in this context, because every
17 provision of assistance through a terrorist organization
18 advances its ability to conduct an act of terrorism, and
19 given the way in which we have demonstrated that the Kingdom's
20 provision of support to Al Qaeda was very expansive and
21 provided the bulging of the funding that enabled Al Qaeda to
22 build and sustain the organization, it is more than that here,
23 particularly in the current setting, which is a preliminary
24 motion to dismiss.

25 JUDGE DANIELS: You think that that has a practical

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1 effect on the analysis at this point?

2 MR. CARTER: Your Honor, I don't know that as a
3 practical analysis because we pled way beyond this. My point
4 is that the Kingdom's broad argument is that congress embedded
5 all of these very stringent standards in JASTA that would make
6 it more difficult, and the floor sponsors have been very clear
7 that they did the opposite, and that is our point.

8 JUDGE DANIELS: Well, the part that I'm not sure I
9 should do anything with is some determination of whether this
10 is a modest standard or a stringent standard and is the
11 standard --

12 MR. CARTER: It is the standard and the standard is
13 reasonable connection, that's correct.

14 One of the other things that they did in JASTA is to
15 add the term agent. Now, the Kingdom of Saudi Arabia has
16 argued that the addition of the term agent and language
17 providing that the acts of the agent would be attributable to a
18 foreign state, to the extent that the agent acted within the
19 scope of the agency, did nothing to alter the alter-ego
20 standard acquiring day-to-day control. That simply makes no
21 sense because congress was acting here and made clear it was
22 acting here for the purpose of removing impediments that it
23 confronted the 9/11 plaintiffs in this case, one of which was
24 the alter-ego regime.

25 The term agent does not appear in other exceptions of

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1 the foreign terrorist immunity act with the exception of the
2 state sponsoring modeling after that. Again, the floor
3 sponsors were very clear about what they were doing. They
4 said, by including that language, they intended to incorporate
5 principals of vicarious liability, including responding to
6 superior, common law agency, and secondary liability.

7 So when the Kingdom suggests that the alter-ego
8 standard remains the operative standard for purposes of
9 demonstrating the sufficient relationship to attribute the
10 actions of an agent to the principal, it is simply wrong. It
11 is a common law agency analysis, which is different. A
12 manifestation on the part of the principal for the ability to
13 act on its behalf and subject to its control is the standard
14 for purposes of that.

15 The Kingdom effectively compounds its errors about
16 what JASTA requires with confusion about whether it is done
17 anything here sufficient to create the factual challenge to the
18 allegations and other submissions the plaintiffs have offered
19 and what would happen if it had done so. To the extent that a
20 foreign government in an FSIA case wants to raise a factual
21 challenge to some aspect of the plaintiffs' pleadings, the
22 cases demand that it do so by coming forward with its own
23 evidence, typically in the form of an affidavit, that
24 specifically confront the substance of the allegations relevant
25 to the jurisdictional determination and specifically denied

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1 that it is true.

2 Your Honor asked Mr. Kellogg a number of questions
3 about this, and this goes to the certain part of the matter.
4 They haven't done that here, and what is so conspicuously
5 absent from their filing is anything of that nature. In other
6 words, your Honor, we made very clear allegations that Omar Al
7 Boyoumi was an agent of the Saudi government, that he was
8 taking instruction from individuals in the Ministry of Islamic
9 Affairs offices, including Fahad Al Thumairy. There is no
10 affidavit denying any of those facts, even though those are
11 matters clearly within the knowledge and control of the
12 Kingdom.

13 JUDGE NETBURN: If they are correct that a lot of
14 that, a lot of those allegations are supported by evidence that
15 the court deems inadmissible such that those allegations are
16 struck, is it still your contention that the government needs
17 to put forward its own affirmative evidence to prove that the
18 allegations are false, or is it adequate for them simply to
19 just strike down your allegations as being founded on
20 inadmissible evidence?

21 MR. CARTER: Your Honor, the way the Kingdom tries to
22 get to this notion that we are required to come forward with
23 admissible evidence at the outset of the case and before
24 discovery is by arguing that they have created a fact challenge
25 and then trying to take refuge in cases that indicate that once

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1 a foreign government has created that kind of fact challenge, a
2 plaintiff has the burden of going forward with evidence.

3 There are a number of Second Circuit cases that are
4 simply wrong, though, about the nature of that burden and what
5 it requires a plaintiff to do. It does not require a plaintiff
6 to come forward as part of its initial burden of production
7 with any admissible evidence. It is clearly not the case.

8 The Second Circuit cases, Robinson, Virtual Countries,
9 and all of the others indicate that a plaintiff can meet its
10 burden of production in response to that kind of a challenge by
11 virtue of its allegations, factual allegations, uncontested
12 facts put before the court, or affidavit and other evidentiary
13 materials if it chooses to do so. All of those cases talk
14 about the court being required, in evaluating the factual
15 challenge, to go and look at the factual allegations of the
16 pleadings.

17 The facts don't disappear. They still remain and they
18 are certainly sufficient and can be sufficient to carry a
19 plaintiff's initial burden of production. The Kingdom is
20 simply wrong. It was required to come forward with admissible
21 evidence at the stage of this proceeding. We are not there.

22 To take that even a step further, your Honor, by
23 suggesting that the court should be making broad admissibility
24 determinations and weighing their evidence against our
25 evidence, again, we are just not at that stage in the

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1 proceeding at this point in time.

2 At this point in time, the question initially is
3 whether or not they have done anything sufficient to raise the
4 fact challenge to the allegations of plaintiffs' complaint and
5 they simply haven't. They haven't come forward with any
6 affidavit directly challenging these things, and they can't
7 salvage that by the language they point to in the 9/11
8 Commission report and some of the other documents.

9 None of these cases support the view that if defendant
10 foreign state can create a fact challenge simply by saying that
11 the U.S. government looked into something and declined to draw
12 inferences. That does not directly meet the substance of the
13 plaintiffs' factual allegations and deny its truth, which is
14 what has to happen in order for there to be a fact challenge,
15 and that simply hasn't happened here.

16 Beyond even all of that, your Honor, the cases are
17 quite clear that a plaintiff must be afforded an opportunity to
18 conduct discovery to develop evidence in support of its
19 jurisdictional theories. So if there is a fact challenge here,
20 the result is discovery with regard to the disputed fact.

21 The additional problem with the way the Kingdom has
22 approached all this is even to the extent they could credibly
23 claim that the 9/11 Commission report and some of the other
24 documents create a fact challenge to plaintiffs' allegations,
25 they certainly don't create a fact challenge to the degree the

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1 Kingdom implies. The 9/11 Commission report, for instance,
2 says nothing about plaintiffs' claims that Saudi government
3 money flowed to Al Qaeda through its charitable organizations.
4 In fact, to the extent it says anything about it, it
5 acknowledges a likelihood that charities with sufficient Saudi
6 government sponsorship funded Al Qaeda.

7 So it is entirely in accord with plaintiffs'
8 allegations on those points. They simply haven't done anything
9 to bring us into this world where they want this case to live,
10 where we are engaging in this sort of bizarre trial on the
11 merits via assessments of whether or not documents are
12 ultimately admissible. Those kind of determinations can't even
13 be made without the context of a hearing or a trial setting.
14 They simply haven't done anything.

15 JUDGE DANIELS: Why isn't the determinative analysis
16 still pretty much the same as before JASTA?

17 Isn't the primary issue still whether or not that you
18 have made sufficient factual allegations with regard to these
19 individuals as agents or the charities to demonstrate a
20 plausible case that they have engaged in acts which would make
21 the Kingdom of Saudi Arabia liable? That still depends on the
22 factual allegations you make and whether or not they support
23 the conclusions that you want drawn from that.

24 For example, to allege that two people conspired
25 together is a conclusion. If that conclusion is simply based

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1 on the fact that they were in the same city at the same time,
2 that would not be a sufficient factual allegation to support
3 the conclusion that they conspired with each other.

4 I am trying to make sure that I don't see a
5 significantly different way to approach this just in terms of
6 analyzing the plausibility of the theories that you're setting
7 forth. I want to make sure that there isn't some other
8 significant determinative issue, other than whether or not this
9 new complaint has sufficient additional facts to lead to the
10 conclusions that you want drawn that Saudi Arabia, under JASTA,
11 is responsible as alter ego or through agents who acted on
12 their behalf.

13 MR. CARTER: Well, your Honor, before getting to that,
14 I want to go back to the point I was making before. Again,
15 because of this elimination of the entire tort doctrine, JASTA
16 talks about claiming being able to proceed for facts of the
17 foreign state itself in providing material support.

18 Now, your Honor determined in the prior proceedings
19 under the tort exception that the activities that we had
20 described about Saudi Arabia's own state funding of Al Qaeda
21 filtered through its charitable organizations were
22 jurisdictionally irrelevant because of the entire tort rule.

23 Now that the entire tort rule is gone, those claims
24 are now, again, viable on the factual allegations of putting
25 them in the complaint to determine whether or not we made out a

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1 case that can go forward. That is true. It is plausibility.
2 Those claims simply weren't assessed at all in connection with
3 the prior proceedings.

4 Now, the Kingdom tries to sort of avoid this result of
5 its own being activities in support of Al Qaeda being viable by
6 making a few arguments. One is they suggest that they haven't
7 given them fair notice of this theory. It is a difficult
8 argument to understand, your Honor. The consolidated amended
9 complaint incorporates the averment from the earlier
10 proceedings in the case. As I mentioned at the outset, when
11 the Kingdom received that averment and moved to dismiss on the
12 basis of that pleading, it described it as principally alleging
13 that Saudi Arabia committed a tort by funneling money to
14 Al Qaeda through charitable organizations, thereby providing
15 material support for terrorism. So this idea that they didn't
16 have fair notice when the earlier pleadings incorporated in
17 part and parcel of all this simply doesn't make any sense.

18 The next argument is that we haven't adequately put
19 them on notice of and provided nonconclusory allegations that
20 the charities were fronts. Now, the idea of this argument
21 appears to be that the funding has to be direct in order to be
22 actionable and, therefore, in their view, we have to prove that
23 the charities were integrated components of Al Qaeda on some
24 level. Again, that is simply not right.

25 In passing JASTA, the sponsors and the congress in the

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1 statement of purpose was absolutely explicit that it would
2 apply to claims that a foreign state provided material support
3 to a terrorist organization directly or indirectly. Any idea
4 that there is a distinction between direct and indirect support
5 that remains viable has gone off the table. In addition, they
6 made clear that it would apply to forms and material support
7 provided whether knowingly or recklessly. So they specifically
8 rejected the notion that there is some sort of specific intent
9 requirement in order to allege these claims.

10 With regard to those claims, there is an immense
11 amount of factual detail in the pleadings documenting the
12 legacy of the cooperation between the charities that the
13 Kingdom was funding, broadly funding, and Al Qaeda and an
14 awareness on the part of the Kingdom that the money it was
15 pouring into those organizations was being broadly funneled
16 back to the Al Qaeda organization.

17 We have made specific allegations that the Kingdom was
18 very much aware of that and continued to pour money into that
19 apparatus. In fact, the 9/11 staff monograph on terrorist
20 financing confirms that U.S. officials met with Saudi officials
21 to raise concerns about this funding mechanism on numerous
22 times before the September 11 attacks, but the Saudis were not
23 responsive. All of that fits the model of a tortious act that
24 JASTA was directly designed to reach. It reaches that claim
25 here.

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1 JUDGE DANIELS: Again, still, going back to one of my
2 earlier questions, that is only the beginning of the analysis.
3 Even if you have sufficient allegations that the Kingdom is
4 funneling money to Al Qaeda, the real second question is, what
5 are they doing with that money and whether or not that money
6 was used for the terrorist attacks on 9/11?

7 MR. CARTER: Your Honor, the showing that is necessary
8 for us to establish liability -- again, we are not at that
9 phase, we are at the phase of whether or not we have brought
10 the case within JASTA's jurisdictional element -- but clearly
11 it does not require us to demonstrate that the money provided
12 by the defendant was used for the September 11 attacks.

13 JUDGE DANIELS: So you say that there is jurisdiction
14 to assert a claim under JASTA by simply alleging that the Saudi
15 Arabian government gave money to Al Qaeda, that would be
16 sufficient for jurisdiction under JASTA?

17 MR. CARTER: Your Honor, we would have to demonstrate
18 a reasonable connection between the provision of that support
19 and the resulting harm.

20 JUDGE DANIELS: Right.

21 MR. CARTER: Correct.

22 JUDGE DANIELS: When you articulate what was required,
23 you keep leaving that part out. I'm just trying to understand,
24 was there some significant reason why you're leaving that out?
25 That is a critical part of it.

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1 MR. CARTER: No. It is a component of the immunity
2 exception, your Honor, but perhaps I'm leaving it out because
3 the factual allegations go so far beyond that standard --

4 JUDGE DANIELS: But JASTA does not cover the provision
5 of -- unless you want to correct me -- JASTA does not cover,
6 even under jurisdictional analysis or any other analysis, the
7 provision of financial support to Al Qaeda by Saudi Arabia
8 outside of the U.S. with no consequence in the U.S. JASTA
9 would not cover that.

10 MR. CARTER: Your Honor, the JASTA requires that
11 there have been an act of international terrorism on U.S. soil
12 causing physical harm.

13 JUDGE DANIELS: Right. That is a real important part
14 of it.

15 MR. CARTER: That is an important part of it.

16 JUDGE DANIELS: That is critical.

17 MR. CARTER: The causal relationship does not at all
18 require the showing that a contribution of support by the
19 defendant was specifically used for purposes of the act of
20 terrorism.

21 JUDGE DANIELS: How do you say you demonstrate that it
22 caused the injury in the United States?

23 MR. CARTER: Your Honor, the way that we described
24 that it caused the injury in the United States is by tracking
25 what U.S. National Security and counterterrorism officials have

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1 said, which is that Al Qaeda was a sophisticated terrorist
2 organization, and in order to simply maintain and sustain its
3 operations, pay its recruits and do all of those things, it
4 needed about \$30 million a year, and that the funding was
5 essential to the simple existence of the organization and its
6 ability to carry out sophisticated international attacks.

7 We describe from the 9/11 Commission all of the
8 various sort of structural and asset meetings of a terrorist
9 organization, and then also describe how the money that was
10 coming to Al Qaeda from the Saudi government via these
11 charities represented the overwhelming bulk of the funding that
12 Al Qaeda used to maintain and build the organization and
13 acquire its global strategy.

14 JUDGE DANIELS: Under that theory, would it be that
15 Saudi Arabia would be responsible for every terrorist act
16 committed by Al Qaeda?

17 MR. CARTER: Your Honor, it wouldn't be responsible
18 for terrorist attacks that don't occur in the United States.

19 JUDGE DANIELS: Regardless of whether or not they were
20 aware of any terrorist attacks, any terrorist attack, would
21 that make Saudi Arabia liable for all other terrorist attacks
22 that Al Qaeda was involved in simply because some of the money
23 to fund Al Qaeda came from Saudi Arabia, even if Saudi Arabia
24 had nothing to do, didn't have any agents who supported the
25 terrorist attack, or didn't give the money specifically for

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1 that terrorist attack, wasn't even aware that that money was
2 going to be used for that terrorist attack?

3 I am not sure. I am just trying to figure out what
4 the limits of the extent of your argument are.

5 MR. CARTER: Your Honor, I think, first of all, the
6 winning provision of financial and other support to a terrorist
7 organization certainly exposes you to potential legal
8 liability. There is no question about that.

9 JUDGE DANIELS: Only if there is some connection to an
10 injury that occurs in the United States that that money is used
11 for.

12 MR. CARTER: Right. The framework for making that
13 determination is the Halberstam substantial assistance.

14 JUDGE DANIELS: Right.

15 MR. CARTER: It also incorporates the conspiracy
16 liability standard.

17 JUDGE DANIELS: Right.

18 MR. CARTER: The determination ultimately on the
19 merits as to whether or not the contribution of material
20 support is sufficient to establish liability runs through the
21 Halberstam framework, which is multiple factors, the nature and
22 kind of assistance --

23 JUDGE DANIELS: Right.

24 MR. CARTER: -- the kind of act being encouraged, the
25 nature of the relationship between the wrongful party and the

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1 ultimate tortfeasor.

2 JUDGE DANIELS: Your analysis leaves all of that out.
3 Your analysis just now doesn't say that had anything to do with
4 the nature of the terrorist act or the intent to support the
5 terrorist act. I am trying to make sure I understand it.

6 You seem to be arguing that the jurisdictional
7 analysis has only to do with whether or not you have
8 established that Saudi Arabia gave money to Al Qaeda.

9 MR. CARTER: No. I think it also requires an analysis
10 of whether or not there is a reasonable connection between that
11 contribution of support and the September 11 attacks.

12 JUDGE DANIELS: Right.

13 MR. CARTER: Correct. Again, we are saying that there
14 was because it was the bulk of the funding that it used to
15 maintain and build the infrastructure that it used on that day
16 to carry out that horrific act. So there is a reasonable
17 connection.

18 There is much more, your Honor.

19 JUDGE DANIELS: I don't understand how you make that
20 connection. If I gave you \$10 and you went and bought \$5 worth
21 of ice cream, why is it that I gave you \$10 to buy ice cream?
22 I want to make sure I understand the analysis. The analysis is
23 not -- maybe it is, and then I'll see if that is sufficient
24 analysis -- but the analysis is not simply whether Saudi Arabia
25 gave money to Al Qaeda knowing Al Qaeda was a terrorist

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1 organization, so every terrorist act that Al Qaeda commits
2 Saudi Arabia is responsible for. That is not what JASTA
3 provides.

4 MR. CARTER: Your Honor, again, the substantive
5 liability claim underneath JASTA may very well authorize
6 liability for the winning provision of material support to a
7 terrorist organization like Al Qaeda that has declared its
8 intention to use any resource provided for it to carry out --

9 JUDGE DANIELS: What kind of language in JASTA?

10 MR. CARTER: I was talking about the underlying
11 Halberstam analysis.

12 JUDGE DANIELS: I am talking about applying that to
13 JASTA. I don't see where jurisdiction under JASTA is that
14 broad.

15 MR. CARTER: Your Honor, as I said, and the decisions
16 that JASTA incorporated, like Kilburn, the causation threshold
17 for the immunity exception is lower than for the underlying
18 cause of action.

19 JUDGE DANIELS: But it still exists.

20 MR. CARTER: It still exists and it is a reasonable
21 connection and that is the standard.

22 JUDGE DANIELS: That is what I am trying to
23 concentrate on, on that aspect now.

24 In what way do you say, whatever is the basis, the
25 factual basis for the conclusion that the money given that you

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1 said money given to Saudi Arabia to Al Qaeda was used to cause
2 9/11?

3 MR. CARTER: Let me give you a specific example. One
4 of the charitable entities which this funding mechanism was
5 occurring, the National Islamic Relief Organization, and the
6 U.S. government and diplomatic cables we submitted on record
7 indicated that the IIRO was the principal sponsor of terrorist
8 training camps in Afghanistan during the Taliban regime, and
9 further indicated that Osama bin Laden and his entire IIRO
10 network were for terrorist activities.

11 So this is the money being used to maintain the camps
12 in Afghanistan where the hijackers are being trained. We have
13 actually submitted CIA reports as well discussing this exact
14 thing. This is the almost singular source of IIRO's money was
15 with the government of Saudi Arabia, and the money was running
16 directly through IIRO and into Al Qaeda's coffers and being
17 used to maintain these terrorist training camps.

18 Another one of the entities --

19 JUDGE NETBURN: I'm sorry. That was established in a
20 CIA report you said?

21 MR. CARTER: There is a CIA report talking about it
22 being a principal funder of training camps in Afghanistan and a
23 whole range of state department diplomatic cables and our
24 pleadings as well as file of record.

25 JUDGE DANIELS: What specifically are you alleging

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1 that occurred at the training camps that Saudi Arabia gave
2 money to Al Qaeda for that caused 9/11?

3 MR. CARTER: Your Honor, again, the allegation is more
4 fundamental than that. The allegation is that over the course
5 of the decade leading up to 9/11, it was Saudi money that
6 enabled bin Laden to build and maintain the organization and
7 acquire the straight capabilities and that ran to every aspect
8 of it.

9 Again, in our pleadings, we cite countless
10 descriptions from U.S. counterterrorism officials describing
11 this kind of a nexus between providing financial support to
12 terrorism and the capacity of the responsible terrorist
13 organization to carry out terrorist attacks. They need money.
14 Even the most modest attack requires massive funding to
15 maintain the global infrastructures to support it.

16 So there is this relationship, this very real direct
17 relationship, between providing contributions of financial
18 support to a terrorist organization and resulting acts of
19 terrorism.

20 JUDGE DANIELS: The reason why I ask it that way -- I
21 don't want to harp on this -- the reason why I ask it that way
22 is because hasn't the issue before JASTA, the issue of whether
23 or not one can assert a claim based solely on the fact that
24 money was provided to a terrorist organization to do terrorist
25 acts, wasn't sufficient for a claim?

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1 I mean, didn't every court that analyzed that issue
2 say that that itself is not sufficient? That doesn't state the
3 claim. You can't just simply say, generally, I give money to
4 terrorists, so I am responsible for every act that the
5 terrorist may subsequently do if I can show that they used some
6 of that money to do so.

7 How did JASTA change that? JASTA didn't change that.

8 MR. CARTER: Your Honor, I am not sure. I don't think
9 it is correct that every court had determined that giving money
10 to a terrorist organization is an insufficient basis to hold
11 the donor responsible for committing an act of terrorism. In
12 fact, that the whole point of the anti-terrorist act is to make
13 that requirement.

14 JUDGE DANIELS: But the analysis under the act was
15 always that you need more than just simply saying that they
16 provided money to a terrorist organization somewhere across the
17 world and that the terrorist organization's use of that money
18 makes them responsible for all of the terrorist acts.

19 Do you think I am mischaracterizing what the law is on
20 that?

21 MR. CARTER: I do, your Honor.

22 JUDGE DANIELS: OK.

23 MR. CARTER: I do a little bit.

24 JUDGE DANIELS: On what theory would Saudi Arabia be
25 liable for Al Qaeda's acts if all that was established was that

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1 was Saudi Arabia gave money to Al Qaeda?

2 MR. CARTER: Your Honor, it is not simply that it gave
3 money to Al Qaeda. It goes much further.

4 JUDGE DANIELS: Right.

5 MR. CARTER: The extent of the money that we're
6 talking about here --

7 JUDGE DANIELS: It doesn't matter how much money they
8 give. They can give \$10 or they can give a million dollars.

9 The question is: Does that make them liable for every
10 terrorist act that Al Qaeda subsequently does utilizing any
11 portion of that money?

12 My understanding of the law is no, you need more than
13 that. You've got to show some real causation with regard to a
14 particular terrorist act.

15 MR. CARTER: Your Honor, I think the observation that
16 it doesn't matter if you give five or a million dollars changes
17 that because if, for instance, you gave Al Qaeda \$30 million
18 and completely funded its entire budget for a year, that would
19 obviously make a difference between if you gave a single dollar
20 for sure. For sure.

21 JUDGE DANIELS: Yes, but you have already made the
22 argument, and the legitimate argument, that simply spending
23 \$500 to give one of the terrorists a room in a hotel would be
24 sufficient. It doesn't have to be a million dollars. Buying
25 that person a plane ticket would be sufficient.

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1 So the amount of money doesn't determine whether or
2 not you're supporting the terrorist act that is committed on
3 9/11. I'm not sure why that enters into the analysis.

4 MR. CARTER: Your Honor, again, the cases all instruct
5 that there is not this requirement that you have provided the
6 support for the specific act of terrorist that results in the
7 plaintiffs' harm and that contributions of general support to a
8 terrorist organization can absolutely establish liability.
9 Again, that kind of framework that Halberstam established
10 guides that analysis.

11 Under that, if the provision of support were
12 particularly de minimus assistance, it would impact whether or
13 not it amounted to substantial assistance. But here we are
14 clearly talking about a level of support that goes well beyond
15 Halberstam's substantial assistance standard and, therefore,
16 readily establishes the aiding and abetting component of the
17 underlying tort claim. Therefore, it also goes beyond the
18 reasonable connection standard of JASTA's immunity exception,
19 which is where we are.

20 JUDGE DANIELS: Well, I don't have all the case law in
21 front of me, but the Second Circuit -- I'm trying to figure out
22 which opinion it was. I just wanted to quote from the Second
23 Circuit in their 2013 opinion where they say that, similarly,
24 the Rule 12(b)(6) defendants are alleged to have provided
25 funding to purported charity organizations known to support

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1 terrorism that, in turn, provided funding to Al Qaeda and other
2 terrorist organizations. These allegations are insufficient
3 for approximate causation purposes for the same reasons as
4 alleged in Rothstein.

5 We are also not persuaded that providing routine
6 banking services to organizations and individuals to be
7 affiliated with Al Qaeda, as alleged by plaintiff, proximately
8 caused the September 11, 2001 attacks or plaintiffs' injuries.

9 JUDGE NETBURN: Your argument is that the proximate
10 cause standard is no longer the precedent?

11 MR. CARTER: The Rothstein proximate cause standard --
12 and I'm sorry for not making up on this earlier -- was
13 repudiated by JASTA. That is one of the things that JASTA got
14 rid of it.

15 JUDGE DANIELS: But a causation requirement still
16 exists.

17 MR. CARTER: A causation requirement still exists.

18 JUDGE DANIELS: The rule that basically says you don't
19 have a cause of action generally just because a foreign country
20 gives money to Al Qaeda outside of the United States, you still
21 have to have causation. You seem to be arguing that the thrust
22 of your evidence is that Saudi Arabia gave money to Al Qaeda,
23 and then Al Qaeda used -- obviously, if they're a terrorist
24 organization, any money you give them is going to be used for
25 terrorist acts.

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1 I'm not sure why it is plausible either to state a
2 cause of action or for jurisdictional purposes to simply rely
3 on the facts that Saudi Arabia gave money to Al Qaeda.

4 MR. CARTER: Your Honor, again, I go back. It is both
5 the Halberstam aiding and abetting and conspiracy theory.

6 JUDGE DANIELS: Even without some connection to 9/11,
7 some greater connection to 9/11 other than, well, you gave
8 money to a terrorist organization, the terrorist organization
9 committed a terrorist act, so you're responsible for whatever
10 terrorist act occurred?

11 MR. CARTER: Again, your Honor, that is not what we
12 have alleged with regard to Saudi Arabia. We have alleged that
13 the contributions to support that it provided were uniquely
14 important to Al Qaeda being able to do this.

15 JUDGE DANIELS: My question simply, you say that is
16 required for you to demonstrate or not required?

17 MR. CARTER: I think what we have said is more than
18 would be required to.

19 JUDGE DANIELS: Which part is more than what you would
20 be required to? That's what I am trying to understand.

21 MR. CARTER: Your Honor, you think we have gone so far
22 to say it was essential to the acts. I think there may be a
23 lesser showing of support that still is an analysis of
24 substantial assistance under the Halberstam framework.

25 JUDGE DANIELS: The definition of causation clearly

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1 still means more than simply I gave you money and you did
2 something bad with the money.

3 MR. CARTER: Your Honor, again, under Halberstam, the
4 question is first whether or not there was substantial
5 assistance.

6 JUDGE DANIELS: Right.

7 MR. CARTER: If there is substantial assistance and
8 you're on the hook for any resulting violence. The substantial
9 assistance inquiry is the first inquiry and, again, there is a
10 number of factors. One of the factors is that providing
11 support for a particular harm can amount to substantial
12 assistance even if it is de minimus. And providing funding to
13 a notorious terrorist organization like Al Qaeda, who has made
14 clear how it is going to use it, can actually amount to
15 substantial assistance even if it is minimal.

16 JUDGE NETBURN: Your view is that question is not
17 before us right now?

18 MR. CARTER: It is not before you right now. Again,
19 we have gone way beyond what we're talking about. I want to
20 make sure I don't take up any of Mr. Pounian's time.

21 JUDGE DANIELS: Sure.

22 MR. CARTER: I do want to talk about one or two other
23 things.

24 With regard to this question of whether or not there
25 is enough in the record to establish that the charities were

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1 agents of the Kingdom of Saudi Arabia, again, that is not the
2 alter ego where it is a different concept. We have described
3 in very particular detail how they were established by the
4 government of Saudi Arabia to serve as the principal
5 instruments for carrying out these proselytizing activities
6 globally, you know, the Kingdom has objected strenuously to our
7 use of the term Wahhabism and characterizations of this
8 extreme.

9 The fact of the matter is, your Honor, it is not our
10 term. It is actually the term that is used in the 9/11
11 commission report to describe Saudi Islam and the 9/11
12 Commission report draws a very direct relationship between that
13 varying of Islam and the ideological foundation for Al Qaeda.

14 JUDGE DANIELS: I'm not sure how that fits into the
15 definition.

16 MR. CARTER: I'm sorry, your Honor. I am just simply
17 responding to the characterization that we are vilifying
18 Muslims. We are not. We are tracking exactly how the 9/11
19 Commission described this particular problem.

20 In the pleadings, we explain how the Wahhabi clerics
21 who control these charities and broadly used them to support
22 jihadist activities globally. This is evident in the whole
23 history of the legacy of the cooperation between those entities
24 and bin Laden. That cooperation was grounded in the Afghan
25 jihad originally, which served as an infrastructure to support

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1 them meeting there. They then deployed them to Bosnia where
2 they engaged in the same activity.

3 JUDGE DANIELS: Again, I am just not following this in
4 relationship to your agency argument.

5 MR. CARTER: Your Honor, the point is, we have argued
6 these entities were created to serve a particular government
7 purpose, that they were the principal instruments through which
8 the Kingdom fulfilled its obligation under Saudi Arabia's basic
9 law of governance to propagate Wahhabi Islam globally.

10 JUDGE DANIELS: I don't understand what definition of
11 agency that you're using that, given those facts, that means
12 that they are agents for Saudi Arabia to commit terrorist acts.

13 MR. CARTER: I understand, your Honor. In terms of,
14 first of all, I am trying to get to the agent status.

15 JUDGE DANIELS: Right.

16 MR. CARTER: Then I'll talk a little bit about the
17 scope.

18 JUDGE DANIELS: Wait. When you say their agent
19 status, I am analyzing it as to their agent status for
20 terrorism. You seem to be saying, well, I'm not saying that
21 they were an agent for terrorism, I am saying they were an
22 agent for other religious purposes and that makes them
23 responsible for the terrorism.

24 MR. CARTER: Your Honor, we don't describe it that
25 way. What we are saying is that the program, the Global

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1 Islamist agenda of the clerics who were being provided this was
2 not merely to spread a certain idea of religious thinking.
3 They embraced partnerships with jihadist organizations as a
4 mechanism to fulfill their goal of spreading this particular
5 variance of Islam.

6 JUDGE DANIELS: You don't say that they are an agent
7 for Saudi Arabia for terrorism?

8 (Continued on next page)

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1 MR. CARTER: Well, your Honor, again, bin Laden
2 wouldn't have called what he was doing terrorism.

3 THE COURT: I don't care what he called it. I'm
4 trying to figure out how you define it. As I say, you say it's
5 sufficient to allege that they were an agent of Saudi Arabia
6 for a non-terrorist purpose, but that makes them an agent for
7 the terrorist act.

8 MR. CARTER: Your Honor, we're saying that the
9 sponsorship and promotion of jihadist activity, including
10 terrorist activity, was not so far removed from the core scope
11 of their mission as to cause defaults on the other agency --
12 let me explain.

13 THE COURT: Yes. Okay, but when you say that it is
14 not far removed, even an agent with jihadist ideology doesn't
15 necessarily mean that that entity is going to be involved in
16 murder and terrorist attacks.

17 MR. CARTER: That's what I was getting to, your Honor.

18 THE COURT: Okay.

19 MR. CARTER: I think it's evident, when you look at
20 the actual so-called charities that comprise this religious
21 apparatus, we've offered evidence that every single one of
22 these agencies was pervasively involved in promoting terrorism.

23 THE COURT: But promoting terrorism is different than
24 committing terrorist acts.

25 MR. CARTER: Well, your Honor, the descriptions of

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1 what these organizations were doing go beyond just providing
2 support. They actually talk about being organizationally
3 intertwined with Al Qaeda to a very extensive degree.

4 THE COURT: That's what I'm trying to understand. Is
5 your agency theory based on the fact that you claim that
6 they're espousing jihadist ideology, or is it based on the fact
7 that you said they, themselves, are involved in committing
8 terrorist acts? And, therefore, the terrorist acts that
9 they're involved in committing or supporting, they're doing so
10 as agents of Saudi Arabia?

11 MR. CARTER: Your Honor, we're saying that the violent
12 activities that these organizations engaged in, the terrorist
13 activities, were part and parcel of the way that they believed
14 it was appropriate to engage in their various missions.

15 THE COURT: When you say "these organizations" --

16 MR. CARTER: I'm saying the Saudi government's
17 proselytizing organizations.

18 THE COURT: Then how is that defined as a terrorist
19 act? I'm not sure I understand what terrorist acts that you're
20 referring to by these organizations.

21 MR. CARTER: Your Honor, again, we've gone into really
22 extensive details in the pleadings about the degree of
23 collaboration between these organizations and Al Qaeda.

24 THE COURT: Just give me an example. Give me an
25 example of what act you're saying that Saudi Arabia is

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1 responsible for because one of these organizations was the
2 agent of Saudi Arabia for that act.

3 MR. CARTER: Your Honor, let me try to do this by
4 providing a statement from the former U.S. Deputy National
5 Security Advisor, Juan Zarate, who was one of the architects of
6 our post-9/11 counterterrorism structure. He observed that the
7 Saudi's had built an extensive global network spreading a
8 certain brand of religious thought, but in doing so may have
9 provided a platform for Al Qaeda and like-minded adherents, who
10 benefited greatly from this network both financially and in
11 terms of growth. Many of the --

12 THE COURT: Slow down please.

13 MR. CARTER: -- Wahhabi institutions funded out of
14 Saudi Arabia served as way-stations for Al Qaeda operatives and
15 fund-raising. Distinguishing between some of the international
16 Wahhabi organizations and terrorist networks was nearly
17 impossible, especially when support for Al Qaeda and support
18 for spreading Wahhabi beliefs seemed to blend together so
19 seamlessly. This was true in the work of some of the branches
20 of Saudi-based institutions, such as the International Islamic
21 Relief Organization. For us, cutting off flows of funds to Al
22 Qaeda meant much more than just targeting a select few
23 individuals or institutions. It was ultimately about changing
24 the fundamental elements of Saudi policy by constricting how
25 the Saudis and their institutions funded activities abroad.

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1 THE COURT: Okay. So how does that indicate that they
2 are agents for Saudi Arabia committing or supporting terrorism
3 acts.

4 MR. CARTER: Your Honor, again, we're saying that, you
5 know, part and parcel of what they were doing in the period
6 prior to 9/11 in particular, was trying to advance any western
7 pro-jihadi causes. Al Qaeda wasn't any western pro-jihadi
8 organization, and there were broad partnerships between these
9 organizations and Al Qaeda, and it was part and parcel of what
10 they were doing globally.

11 JUDGE NETBURN: And Mr. Kellogg made reference to some
12 of the activities that the Kingdom was engaged in in the mid
13 '90s. Is that something we should even consider in thinking
14 about whether or not funding these charity organizations was an
15 act of developing an agency relationship with Al Qaeda?

16 MR. CARTER: In terms of the temporal remoteness, your
17 Honor, is that the question?

18 JUDGE NETBURN: In terms of what the Court should be
19 looking at in thinking about whether or not you've adequately
20 alleged an agency relationship between the Kingdom and these
21 charities. These arguments are, as I understand them, that
22 these charities then funded Al Qaeda. To the extent that there
23 is affirmative evidence that suggests that the Kingdom was
24 anti-Al Qaeda and was doing things affirmatively to kick
25 Al Qaeda out, is that something that we should be considering

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1 at this stage in the process, or is that something that goes
2 more towards merits and we shouldn't think about it now?

3 MR. CARTER: I think it goes more towards the merits.
4 It's a complicated question. We made the argument that the
5 Kingdom thought that this was in its interest because it served
6 to export the religious venom away from Saudi Arabia, and we
7 ended up suffering harm as a result of that.

8 So I don't think it's necessarily exclusive of one
9 another that they would be trying to protect themselves
10 internally while being accommodating with pushing its agenda
11 outside.

12 So I'm going to let Mr. Pounian speak because I used a
13 good bit of his time. I do just want to say a few things. You
14 know, Mr. Kellogg said a bunch of things about the findings of
15 the 9/11 Commission report and how conclusive they were. One
16 of the attachments to the consolidated amended complaint is
17 what they refer to as the Florida Bulldog memorandum. It's not
18 that. It is an FBI final status report concerning where their
19 investigation stood in 2012.

20 And among other things, your Honor, it confirms that
21 the FBI included that Fahad al Thumairy immediately assigned
22 someone to assist the hijackers upon their arrival in the
23 United States. So, you know, what we have here is a
24 confirmation, and this is confirmed in the 2015 9/11 Review
25 Commission, years after the 9/11 Commission closed its doors.

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1 The 9/11 Review Commission confirms that the FBI continued to
2 maintain an open and ongoing investigation into Fahad al
3 Thumairy and Omar al Bayoumi and their roles in support of the
4 two 9/11 hijackers, Nawaf al Hazmi and Khalid al Mihdhar.

5 The 9/11 Review Commission did not exonerate any of
6 those individuals. Quite to the contrary. It said that the
7 investigation was open, and it encouraged the FBI to continue
8 the investigation. It also went out of its way to cite in a
9 footnote in the 9/11 Review Commission report this 2012 report,
10 which talked about Thumairy's involvement. The further details
11 in the 2012 report document that Fahad Thumairy and Omar
12 Bayoumi were known to have provided substantial assistance to
13 the hijackers. These subjects provided and directed others to
14 provide the hijackers with assistance in daily activities,
15 including procuring living quarters, financial assistance and
16 assistance in obtaining flight lessons and driver's license.

17 It goes on to explain that Bayoumi was living in
18 San Diego on a student visa, just not attending classes and
19 receiving a salary from the Kingdom of Saudi Arabia for job
20 duties he never performed. And lastly, it says that there is
21 evidence that -- the name is blanked out -- Thumairy and
22 Bayoumi were helping in assisting the hijackers.

23 So in terms of what Mr. Kellogg had said about the
24 purported conclusiveness of the 9/11 Commission report in terms
25 of this investigation, it's simply not correct. The

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1 investigation went on long after that, and it directly
2 confirmed a number of the predicate facts that we have alleged
3 previously and filled in a lot of the gaps that we didn't know
4 about.

5 THE COURT: Just, the facts that you rely on in your
6 report, for the most part, in the report it concludes that
7 Saudi Arabia was not involved.

8 MR. CARTER: Your Honor, I don't think that's true.
9 If you're referring to the 9/11 Commission report, again, we
10 don't view anything in that report as concluding that no Saudi
11 agent was involved in the attack. The language in the report
12 simply says that they hadn't found evidence that Saudi Arabia,
13 as an institution or individual senior Saudi officials, had
14 funded Al Qaeda. The construction of that sentence seems quite
15 clearly designed to allow for the possibility that they had
16 found evidence that lower-level Saudi officials were involved
17 and that element of the government, but perhaps not the
18 government as an institution, was providing support to
19 Al Qaeda.

20 THE COURT: I'm not sure that it would be appropriate
21 to conclude that in the absence of that statement in the
22 report.

23 MR. CARTER: Right, but it's also not appropriate,
24 your Honor, to read that language as a complete exoneration,
25 given the way it's very qualified.

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1 THE COURT: No, I understand that, but you're both
2 sort of relying on the same report. You say that certain
3 things that they say in the report lend support to your claim,
4 and they say that, well, rely on the report because the report
5 says there's no evidence to indicate that Saudi Arabia was
6 involved in none of that.

7 MR. CARTER: Your Honor, again, Mr. Kellogg has
8 characterized, for instance, the 9/11 as having exonerated the
9 Saudi government, but it doesn't do that. It just doesn't have
10 any language to that effect.

11 THE COURT: Well, I guess let me be broader on that
12 statement. Those reports that you both reference, none of
13 those reports say that those facts lead to the conclusion that
14 Saudi Arabia was involved in 9/11.

15 MR. CARTER: None of the reports have language to that
16 effect, your Honor.

17 THE COURT: Or anything that means that. I mean, none
18 of them had that kind of a conclusion or anything similar to
19 that kind of conclusion.

20 MR. CARTER: I don't think they have a conclusion,
21 your Honor, but obviously, the question here is whether or not
22 there are factual allegations sufficient to state --

23 THE COURT: And to the extent that they do reach
24 conclusions, the conclusions that they've reached are minimally
25 that there isn't sufficient evidence to conclude that Saudi

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1 Arabia was involved.

2 MR. CARTER: Or that they declined to draw an
3 inference or that there was no evidence, that's correct, your
4 Honor.

5 JUDGE NETBURN: Can I ask one question. My
6 understanding of your principal request is JASTA has changed
7 the landscape and that the threshold for establishing
8 jurisdiction was lowered as a result. And we had a
9 conversation about what's the causation standard and what does
10 it mean to have added the word "agent" into the statute.

11 The other argument that the defendants have made, one
12 argument, is that the standard is not dramatically lower, but
13 their other argument is that the facts that you're alleging in
14 this complaint are no different than the ones that you alleged
15 previously.

16 Can I give you an opportunity just to tell me if you
17 think there are facts that you're alleging in this complaint
18 that are materially different than the information you had when
19 you filed the original complaint? I know you've done some
20 discovery now, if you would want to draw to our attention that
21 you say changed the landscape, setting aside what the statute
22 adds to your claims.

23 MR. CARTER: Yes, your Honor. There are certainly
24 differences, substantial differences between the material
25 that's been before the Court previously and the material that's

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1 before the Court now and that includes the additional details
2 that we now know about the nature of the involvement of
3 Thumairy and Bayoumi, Thumairy's role in immediately assigning
4 someone to help the hijackers.

5 One of the issues that the Court had concerns about
6 previously is an inability to infer from the factual
7 allegations that Thumairy had provided assistance to the
8 hijackers. We now have an FBI report saying that he did just
9 that, and that informs all of the other facts in a very
10 substantial way because it places Thumairy very much at the
11 center of the domestic support network for the two hijackers.
12 We knew that they were ill-prepared for a mission in the United
13 States, that Al Qaeda was unlikely to send them here without
14 arranging in advance for someone to receive them.

15 We knew that they spent time at the King Fahad Mosque,
16 where he was the imam in the days immediately after. The 9/11
17 Commission suggested that the circumstantial evidence made him
18 a logical point of contact. We now have the FBI reaching the
19 conclusion that he immediately assigned someone, and then from
20 that, all of the remarkable circumstances flow with his
21 engagements with Bayoumi, leading to the provision of the very
22 precise forms of assistance that they needed to settle in the
23 United States.

24 So that's one of the areas, your Honor, where it would
25 be different. Obviously, the other area is that, you know,

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1 previously, anything that was said about activities outside the
2 United States was irrelevant, and so everything that's in the
3 complaint that talks about the activities that were occurring
4 that allowed the funding of the training camps, all of these
5 activities now have jurisdictional relevance.

6 JUDGE NETBURN: That's helpful. Thank you.

7 MR. CARTER: Thank you, your Honor.

8 MR. POUNIAN: If I may, your Honor. May it please the
9 Court, my name is Steven Pounian with the firm of Kreindler and
10 Kreindler. I represent the Ashton plaintiffs in this case, who
11 are the family members, the husbands, the wives, the mothers,
12 the fathers, the children of the 2,977 people killed in the
13 9/11 attacks, along with thousands who were injured.

14 The first point I'd like to make, your Honor, is we
15 need discovery from Saudi Arabia. Mr. Kellogg has come forward
16 and said plaintiffs are free to come forward with evidence, and
17 the jurisdictional motion that they've presented here is really
18 equivalent to a summary judgment motion because asking us for
19 evidence on the merits, the key elements of the merits of the
20 case, the tortious act, you know, whether the act is
21 attributable to Saudi Arabia by virtue of an either like scope
22 of employment or alter ego and whether there's causation in the
23 case. Those are the essential elements of the claim, and we've
24 just brought our complaint.

25 All of our clients are here for the first time, your

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1 Honor. They were not involved in the prior case that this
2 Court heard, and we are coming here for justice. And Saudi
3 Arabia has said in this case, well, the balance is a sovereign
4 has a right to -- a greater right than the plaintiffs have --
5 to discovery in this case.

6 Well, I think that's one area that JASTA really
7 changed that balance because in JASTA it said we're going to
8 look all over the world for whatever acts, and if anyone comes
9 and gives support to a terror group that causes injury inside
10 our country, that affects our sovereignty, the sovereignty of
11 the United States, and affects the rights of people here at
12 home, if someone comes and does that, well, that is a different
13 equation and we're going to give those people, according to
14 Congress -- they said specifically in the statute, they wrote
15 in a note that said there's a vital interest of the United
16 States to provide those victims with full access to the courts.

17 And full access to the courts means discovery. You
18 can't file a jurisdictional motion and say, oh, you know, hold
19 the discovery behind your back, hold the evidence and say, oh,
20 you've got to come forward with the evidence. They have the
21 evidence. They have the documents regarding scope of
22 employments. They're the employer. They have those documents.
23 They have the witnesses. They have Thumairy. They have
24 Bayoumi. They have their supervisors who were supervising
25 them, and that's what we need to prove the case. That is the

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1 essential element of the case.

2 Now, I just wanted to turn to your question, Judge
3 Daniels, about what's new, what's different about the case now
4 before when you last heard it, and I'll focus in first on the
5 United States evidence because, you know, JASTA has added
6 evidence outside the U.S., which I'll cover later.

7 But, first, what have we presented? What have the
8 Ashton plaintiffs presented that's new? And there are three
9 things I'd like to focus on. First, the declaration of Steven
10 Moore, the FBI special agent who led the PENTTBOM team in
11 Los Angeles in the first two years when they're investigating
12 to see all of the trails, who was involved in Los Angeles in
13 supporting the hijackers when they came there.

14 And Mr. Moore has come forward and presented -- he's
15 coming forward, really, as a fact witness. He's not an expert
16 who's coming in to give us opinions regarding looking at the
17 evidence in the case. He's coming forward as a fact witness to
18 say what he and his team, team of 400 people, found when they
19 were beating the bushes and looking for the facts in the case.
20 And what he and his team came forward and said was there was a
21 terror cell operating in Los Angeles, populated by Saudi
22 government agents, including Bayoumi and Thumairy, and that
23 Thumairy was the ring leader of this operation, and that he
24 knew ahead of time that the hijackers were arriving. The
25 reason that he knows that is because he set up a place for them

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1 to go on their arrival.

2 And on top of that, he knew the people were Al Qaeda
3 terrorist and that they had a plan to attack inside the United
4 States using airplanes in some way. He didn't know -- maybe he
5 didn't know the whole range of the plan, but according to
6 Detective Moore, who's FBI Special Agent Moore, those details
7 were known by Thumairy at that time.

8 And he arranged a place for them to stay, and he
9 arranged for someone to help them immediately upon their
10 arrival, as is shown -- if I could turn the Court to Exhibit 2,
11 which was just referenced here, if I may, the last page, page 4
12 of that exhibit. It states that Fahad Thumairy was an imam at
13 the King Fahad Mosque near Los Angeles when Hazmi and Mihdhar
14 first arrived in the U.S. Al Thumairy immediately assigned an
15 individual to take care of them during their time in the
16 Los Angeles area.

17 Now, he knew to immediately assign someone because he
18 knew they were coming to Los Angeles. He was part of a cell
19 that knew that. Now, we don't have the hard evidence of that.
20 I need Mr. Thumairy's deposition. I need to know the details
21 of the evidence that Saudi Arabia has in their possession to
22 know that.

23 We also know that Thumairy and Bayoumi were in contact
24 with each other. They had a meeting on February 1st, 2000, at
25 the consulate, and we also know the page prior to this, page 3,

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1 that the part that's highlighted, it says: Shortly after
2 February 4th, 2000, Bayoumi tasked Mohdar to assist Hazmi and
3 Mihdhar. And according to the first sentence, Mohdar played a
4 key role facilitating the daily lives in assisting the
5 hijackers.

6 So it went from Thumairy to Bayoumi to Mohdar as part
7 of this cell that had been formed in Los Angeles. Now, that's
8 the first fact. The details from inside the investigation,
9 conducted and led in Los Angeles by Special Agent Moore.

10 Now, the second fact that's new that was referenced
11 before is on page 4, at the very bottom. If we turn to the
12 next page, it says: There is evidence that -- and it's
13 blank -- tasked al Thumairy and Bayoumi with assisting the
14 hijackers. So someone was involved above Thumairy and Bayoumi.

15 Now, the inference is that it's someone above them in
16 the Saudi government. We don't know for certain from this
17 document who that is, but we know who Bayoumi -- who Thumairy
18 was reporting to. His boss was named -- one of his superiors
19 was named Khalid Suwaylim, and he was at the Saudi embassy in
20 Washington, D.C. And the strange thing is Bayoumi, who's here,
21 if you see on the -- just above the paragraph there, he's
22 living in San Diego on a student visa, despite not attending
23 classes, and receiving a salary from Saudi Arabia for job
24 duties he never performed. Very strange, mysterious.

25 And what is he doing? Well, we find out that Bayoumi

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1 is making phone calls to Thumairy's superior. And if you turn
2 to page 25 -- Exhibit 25 in the exhibits, these are -- this is
3 a record from the FBI of phone calls from Mr. Bayoumi and it's
4 to the embassy of Saudi Arabia. And it says, there's a number
5 there 202-342-3700. This number was called 30 times. The
6 calls, and it's marked out, but we know this is from Bayoumi's
7 phone. And it says these calls were made during the period
8 from January 19th, 2000, to March 24th, 2000.

9 Now, we know the hijackers arrived on January 15th in
10 Los Angeles. Four days later, Bayoumi is calling Thumairy's
11 superior in Washington. Now, how do we know that phone number
12 is Thumairy's superior in Washington? If you go to Exhibit 50,
13 your Honor, you'll see the same phone number on the stationery
14 of Mr. Suwaylim. It's the second page. It's the official
15 Saudi Arabia stationery that has the phone number. That is the
16 same phone number that Mr. Bayoumi, who's on a student visa,
17 doing job duties that he's never performing in Los Angeles,
18 suddenly he's calling someone in Washington, D.C., who's
19 Thumairy's superior.

20 We are entitled to discovery on that. We're entitled
21 to ask Mr. Bayoumi: Why are you calling Thumairy's superior?
22 We're entitled to talk to Mr. Suwaylim, and saying: Why was
23 Mr. Bayoumi calling you?

24 And the third new element in this, your Honor, is a
25 totally different element of money laundering that's going on

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1 also, because Mr. Suwaylim, if we go back to Exhibit 50,
2 Mr. Suwaylim is contacting another Saudi employee who's in
3 San Diego. If you recall, Mr. Bayoumi was living in San Diego,
4 especially an undercover Saudi Arabia employee, who was here on
5 a student visa, essentially violating federal law, working for
6 Saudi Arabia inside the United States as an undisclosed agent.
7 It's against the law to do that, but there was not only
8 Mr. Bayoumi, there was a second person, whose name was Abdi
9 Mohamed.

10 Abdi was also here, he was here on a religious workers
11 visa, but that turned out to be a fraudulent visa. He was
12 working essentially for -- he was working for the Saudi
13 government as a so-called propagator, and the evidence shows --
14 the documents show, that we have found, and he was essentially
15 brought up on immigration charges in San Diego that are
16 completely independent of the 9/11 investigation. And
17 according to those immigration charges, he had set up a
18 charity, a relief charity called the Western Somali Relief
19 Agency, and that charity was used to launder money, we've
20 alleged, to Al Qaeda for three years, from 1998 to 2001.

21 And if I may, your Honor, I'd just like to walk
22 through the documents with the Court. First of all, Exhibit
23 13. Now, Exhibit 13 is a portion of what's called the 28
24 pages, which was part of the congressional joint inquiry that
25 was conducted right after the 9/11 attacks, and this was not

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1 released until 2016, just like the other Exhibit 2 was only
2 released in 2016. So it came after this Court previously heard
3 this case.

4 And this, the inquiry report, describes the exact
5 modus operandi of the money laundering scheme in San Diego. If
6 I could refer the Court to the bottom of the page, where I have
7 highlighted it, it says: There are indications in the FBI file
8 that elements of the Saudi government may have provided support
9 to terror networks. For example, the FBI had identified the
10 Ibu Tamiyah Mosque in Culver City as a cite of extremist
11 activity both before and after September 11th."

12 Now, that mosque is the same mosque where Thumairy was
13 the imam, and he was appointed as imam of that mosque by the
14 Saudi Arabia government, by someone in the government. So the
15 mosque that this document is referring to as being the site of
16 extremist-related activity is Thumairy's mosque. And not only
17 was he working as an imam at that mosque, but we know from
18 Mr. Moore's affidavit that he was handling the finances at that
19 mosque. He was in charge of finances there.

20 Now, it says several subjects -- if I could keep
21 reading, your Honor -- several subjects of the investigation
22 prior to September 11th had close connections to the mosque.
23 Based on interviews and review of the files, San Diego FBI
24 agents believed at the time that these subjects were laundering
25 money through this mosque, first, to Somali non-profit

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1 organizations and then to other entities affiliated with Osama
2 bin Laden.

3 And on the next page, the report gives the timing. In
4 approximately 1998, the FBI became aware of millions of dollars
5 in wire transfers from the Somali community in San Diego to the
6 Al Barakaat Trading Company and other businesses affiliated
7 with Osama bin Laden. Now, this Al Barakaat Trading we've
8 shown in our papers it's a Somali money transfer company.
9 There's a form of hawala transfers that are used essentially to
10 hide -- it's not like a bank transfer. It's a hidden form of
11 transfer of money that's used in a lot of Muslim communities,
12 but it's also used by terrorist organizations to hide the flow
13 of funds.

14 Now, the report continues to say: At the time, the
15 funding appeared to be originating the Somali community in the
16 form of donations to Somali non-profits; however, the FBI now
17 believes that some of the funding actually originated from
18 Saudi Arabia and that both the mosque and the Islamic Center of
19 San Diego were involved in laundering the money.

20 Now, that is the modus operandi, but now we have the
21 specifics of what was going on in San Diego with this Western
22 Somali Relief Agency, the Somali non-profit that was formed by
23 a Saudi Arabia employee Abdi Mohamed, who was working under
24 Khalid Suwaylim, who was also Mr. Thumairy's boss, and it was
25 being run through the mosque that Thumairy was working at.

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1 So if I could refer, your Honor -- we don't have the
2 records on this, the documents, because the immigration files
3 and the prosecution of Abdi Mohamed was not released publicly,
4 but we have portions of the public files, and that's what I'd
5 like to refer the Court to now.

6 If you go to Exhibit 44, it's a brief that was filed
7 by the U.S. Attorney in that case, and on page 2 of that brief,
8 where we've highlighted, it's referring to Mohamed, which was
9 Omar Abdi Mohamed, and it states that he indicated he was the
10 president and founder of the Western Somali Relief Agency. He
11 falsely claimed that the agency received no funding and was an
12 entity in name only.

13 However, financial records show that the Western
14 Somali Relief Agency received over \$326,000 from the Global
15 Relief Foundation and \$5,000 from Al Haramain. Now, as it
16 states here in the next two sentences Global Relief and
17 Al Haramain were both identified after 9/11 as terrorist
18 organizations because they were funding Al Qaeda.

19 It also states here that Mohamed was questioned about
20 his employers, and he failed to list on his application or tell
21 his interviewers that he was an employee, that he had been an
22 employee of Saudi Arabia for almost ten years. He was employed
23 for Saudi Arabia in the United States since 1995, and he was
24 here on a false religious visa.

25 He never -- he had signed up for a -- someone had

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1 surreptitiously got him a job at a mosque in San Diego, but he
2 never actually worked there, and he was in the United States as
3 an employee of Saudi Arabia. Again, a violation of federal
4 law, something that Saudi Arabia had to know about. They had
5 to know that their own employee was illegally in the United
6 States as a foreign undisclosed foreign agent.

7 And what was Abdi Mohamed doing in the United States?
8 If we turn your Honors to page 5, it gives the amounts. Bank
9 records show that between December 1998 and May 2001, the
10 Western Somali Relief Agency received 16 checks totaling
11 \$326,000 from Global Relief. And on the next page it says, in
12 addition to that hundreds of thousands from Global Relief, they
13 received one check of \$5,000 from the Al Haramain Foundation in
14 Ashland, Oregon.

15 Now, we sued the Al Haramain Foundation in Ashland,
16 Oregon, and the one document -- as your Honor may recall, they
17 defaulted in the case, didn't produce many documents. All the
18 documents actually went to -- Saudi Arabia seized the documents
19 in 2004. One of the things we'd like to request are those
20 documents that Saudi Arabia has, but one document we got, your
21 Honor, is the check. And if we turn to Exhibit 107, there is
22 the check from Al Haramain to the Western Somali Relief Agency,
23 dated March 2nd, 2000.

24 Now, this check was ordered to be sent to the Western
25 Somali Relief Agency by a Saudi Arabia employee who worked in

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1 Riyadh, Saudi Arabia, named Buthe, who is also a defendant in
2 this case, your Honor, and he was designated as a terrorist by
3 the United States after 9/11, for providing money laundering to
4 Al Qaeda. \$152,000. He went to Oregon, picked up a briefcase
5 with \$152,000 and carried it to Al Qaeda, and then he was made
6 a designated terrorist.

7 Of course, he didn't lose his job with Saudi Arabia
8 after that. In fact, they gave him promotions, they gave him
9 bonuses, and they started paying him in cash so that he
10 wouldn't have to worry about the sanctions that came with his
11 designated terrorist status. So they helped him get around the
12 sanctions that were imposed as a result of him being a
13 terrorist.

14 But this is the only financial record we have from
15 this scheme, from the WSRA scheme, and our discovery plan asks
16 for the documents that Saudi Arabia has regarding Abdi
17 Mohamed's files, the documents from the Western Somali Relief
18 Agency, the financial records, the communications. And
19 Mr. Buthe is going to be deposed in this case. We're going to
20 have this deposition, and we shouldn't have any resolution of
21 this, any motion, any judgment that Saudi Arabia wants in this
22 case. We shouldn't have any resolution until we take that
23 deposition and get the facts, get the evidence that the
24 families have been denied up until now.

25 So I'd like to turn back, your Honor, if I may, to

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1 exhibit -- to the Exhibit 44, and I apologize, but the detail
2 and the number of facts, it's very easy for Saudi Arabia to
3 come in and say there's no evidence, and then we have to come
4 forward and it takes time.

5 There are inferences that need to be made. There are
6 details, and it's very difficult and complex, the facts in this
7 case, and we need -- I need time to get the facts through. So
8 on page 6. Now, what happened to the money that came from
9 these Al Qaeda funders? WSRA wrote checks of over \$375,000 to
10 various people. The vast majority went to Dahab Shil, a money
11 transmitter. It specializes in sending money to countries in
12 the Middle East and Africa. They wrote over 65 checks to Dahab
13 Shil; the smallest was 370, the largest was 60,000.

14 We want the records of any communications with Abdi
15 Mohamed and Dahab Shil. We want the records regarding Dahab
16 Shil. We believe it's likely, and it's certainly plausible,
17 that the money, this money, went to Al Qaeda, this \$375,000.
18 And why is that? Because of the modus operandi that the FBI
19 found of the money laundering operation from Al Qaeda to the
20 Saudi elements at the mosque, and because the money that was
21 coming in, the money that Abdi Mohamed was getting was coming
22 from these two Al Qaeda funders, Al Haramain and Global Relief
23 Foundation, known Al Qaeda funders.

24 There's a third additional factor here, your Honor,
25 Dahab Shil. What is Dahab Shil, and what were they back in

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1 2001? Now, they have a business that's reputable. I don't
2 know what's going on now, but I can tell you back -- what was
3 going back in 2001.

4 If your Honors would turn to Exhibit 48, this is the
5 record of an interrogation at Guantanamo of a detainee, who was
6 arrested by the Pakistan Security Agency. And they went and --
7 they went to his residence because of reported ties between
8 Dahab Shil and Al Qaeda. That's referenced in the first
9 sentence there.

10 And on the next page, he denied everything, but they
11 went and found all of his records, his computers. They
12 searched them and they assessed him to be an Al Qaeda member, a
13 veteran extremist and a probable associate of Osama bin Laden
14 himself, dating back to 1992. And he provided direct support
15 to Al Qaeda and other terrorist entities through his Dahab Shil
16 business.

17 It says: Prior to his capture, detainee was in
18 contact with other Somalis possibly linked to Al Qaeda, who
19 were living in the United States and who may have been involved
20 in terrorist financing operations. Well, we have alleged, and
21 we believe, that Abdi Mohamed was one of the Somalis in the
22 United States tied to terrorist financing organization, and he
23 was working through Dahab Shil to send money to Al Qaeda. And
24 we believe that there's a more than plausible basis for that
25 allegation and that we should be permitted discovery on that

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1 point.

2 Just one final point on this matter. Who was
3 supervising? As I said before, Abdi Mohamed was being
4 supervising by Khalid Suwaylim, who was Thumairy's superior.
5 And if we go to Exhibit 44, page 7, the very last page of the
6 document, the very first sentence: Other documents show that
7 Mohamed received raises and bonuses for doing good work.

8 Now, we know that he was visited in person by Suwaylim
9 at sometime while he was -- this Western Somali Relief Agency
10 program was going on. So we want to know -- we want his
11 employment records. We want to know why Saudi Arabia came to
12 the conclusion that this Abdi Mohamed was doing good work.

13 Now, let me turn, your Honor -- that's the third
14 difference, the third new element to the case that is different
15 from before. And as I said, we want jurisdictional discovery,
16 document requests, depositions of the relevant actors,
17 Thumairy, Bayoumi, Suwaylim, Abdi Mohamed, their employment job
18 responsibilities, their supervisors, the details, their
19 knowledge, their motives, their contacts.

20 Now, the Court has gone over already the elements of
21 jurisdiction under JASTA, tortious conduct, here, knowingly
22 providing material support. Now, the money, the money that was
23 sent by Abdi Mohamed, the 375,000, under the law, as dictated
24 by the Second Circuit, the relevant cases I think are the Weis
25 case, your Honor, is perhaps a relevant case, and also the case

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1 your Honor mentioned before, the Al Rahji case.

2 The question is whether there is material support to
3 Al Qaeda that's performed knowingly, whether there's a knowing
4 or reckless element to providing material support. And we
5 believe that we've alleged, in terms of Abdi Mohamed, Thumairy,
6 Bayoumi, that those elements are met.

7 There's no requirement that there be actual knowledge
8 of the attacks or the mission. In terms of establishing
9 knowledge, the Second Circuit in the Weis case said there's a
10 lenient standard because it's an issue -- it's a question of
11 fact to be decided by the trier of the facts, in this case,
12 your Honor, to decide, after hearing the evidence, after
13 hearing the witnesses.

14 The second element of jurisdiction is scope of
15 employment, your Honor, or alter ego, something attributing it
16 to the sovereign. And here, it's a question -- it's another
17 question of fact that has to be really resolved by hearing the
18 testimony of the witnesses, by seeing the documents, by seeing
19 what is their job, what are they being told to do, what are
20 their instructions, and it looks at the employee's motive.
21 What is the employee told to do? What do they believe they're
22 doing? Whether they believe they're acting for the benefit of
23 the employer.

24 And here, we've shown that Thumairy and Bayoumi, Abdi
25 Mohamed, they were all tasked by someone, they were instructed.

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1 That's what we believe the evidence will show when we get the
2 evidence. And that tasking establishes scope of employment.
3 If you're told to do something, that means you're acting within
4 your job. By definition, it's within the scope of employment.

5 Now, the third factor is proximate cause, causation,
6 which we have discussed already, and I think Judge Netburn
7 asked earlier, is there another statute that -- is there
8 another case that has interpreted similar language in the
9 statute. The language in JASTA is "caused by," is the injury
10 or death caused by the tortious act. And the words "caused by"
11 were interpreted specifically by the Supreme Court in the
12 Grubart case, an admiralty jurisdiction that we've cited. And
13 they've interpreted it to mean that it's basic proximate cause,
14 standard, traditional cause.

15 JUDGE NETBURN: That's different than what the
16 Plaintiffs' Executive Committee's position is.

17 MR. POUNIAN: Well, the standard is one of -- is a
18 substantial factor and is reasonably foreseeable. That is
19 causation, that is what "caused by" has been interpreted to
20 mean by the Supreme Court in Grubart.

21 JUDGE NETBURN: Right. The definition, as I
22 understand it, is there a reasonable connection.

23 MR. POUNIAN: A reasonable connection, there's
24 different interpretations in terms of that.

25 JUDGE NETBURN: Thank you.

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1 MR. POUNIAN: Now, what is the cause here? The two
2 hijackers came in, according to Mr. Moore, they had zero chance
3 of success without the help of the -- of Bayoumi and Thumairy
4 and the others in the cell that had been set up for them in
5 advance. Money -- your Honor had asked before about how does
6 money connect. It's really, the cases have said is it
7 substantial and is it timely?

8 In terms of in here, we know the cost of the attacks
9 was about \$400,000. So is the money that's coming in to Al
10 Qaeda, the person who gives the money doesn't have to know that
11 they're funding the attacks, but the amount of money has to be
12 such that it is substantial enough to be a cause and that it is
13 timely. If it's money that's given 15 years ago, it may not be
14 timely. If it's a thousand dollars, as opposed to \$375,000,
15 that's a factor. It's a factor that the Court has to weigh and
16 decide as a question of fact.

17 All of these facts, causation, it's not simply a
18 matter of each act piecemeal. You don't look at each act
19 separately, but we look at all the acts that the Court finds
20 are true or that finds to have support in the evidence, and
21 look at all those acts together, cumulatively, to see if they
22 establish a cause. So it's not that we look at one element of
23 money to see if this element of money is enough, or this. But
24 if they give a total of X amount of money, that is what the
25 Court would look at to determine whether there is a cause.

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1 It's the cumulative, aggregate amount of money or the
2 cumulative amount of support, together with the money that's
3 given by Saudi Arabia, which has to await the determination of
4 all the different acts, of all the different things that were
5 done to support Al Qaeda.

6 I just want to briefly look at the reports. There's
7 been a discussion of three government reports. Now, whether or
8 not those are admitted into evidence, we can discuss that ad
9 nauseam. I'm not going to do that right now, but regardless of
10 whether they are, they're all hearsay and the families are
11 entitled to the evidence, the evidence that Saudi Arabia has in
12 their possession because the Supreme Court in Rainy, that
13 Mr. Kellogg cited, specifically stated that the ultimate
14 safeguard to allowing a hearsay report in evidence is the right
15 of the plaintiff, the right of the party to come forward with
16 the evidence, to have the evidence to present to the Court. So
17 here, we need the evidence. We're entitled to discovery of the
18 evidence.

19 Now, even with the 9/11 Commission, they conducted --
20 they didn't look at Abdi Mohamed, they didn't look at Suwaylim,
21 they didn't look at the charities overseas, and they said with
22 Thumairy, we can't find the evidence but we know, we know
23 there's evidence of what happened, in terms of the understand
24 funding through the mosque, through the WSRA charity. And we
25 know that he was tasked by someone -- we have alleged Khalid

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1 Suwaylim at the embassy -- to help the hijackers. We know
2 that, and we need to get the evidence.

3 Now, the Commission interviewed Thumairy and Bayoumi,
4 but they didn't keep a transcript. All we have is a memo, and
5 even that is objected to by the Kingdom. It's a hearsay memo,
6 according to them; so it doesn't go in evidence. So we have
7 nothing. There's nothing at all that the families have because
8 they're holding onto the witnesses and to the evidence.

9 Now, the 2005 FBI/CIA report, I'd just like to turn to
10 that, if your Honors could. It's Exhibit 4 in our binder.
11 Now, Mr. Kellogg pointed out the first bullet point there,
12 which says there's no evidence that the Saudi government or
13 members of the family knowingly provided support for the
14 attacks or had foreknowledge of the terrorist operations. But
15 that is not the test before this Court. The test is whether
16 there was material support to Al Qaeda by the Saudi government.

17 And if you look at the very final paragraph here, it
18 says, in the past, in other words, before 9/11, before 2003
19 when they had a change of heart, evidently, according to this
20 document, the Saudi government found itself in a precarious
21 position. On one hand, it was denouncing Al Qaeda as a threat,
22 and then on the other hand, it was treating the group, the very
23 last five words of the document, treating the group with
24 special consideration. What is the special consideration that
25 Saudi Arabia was treating Al Qaeda with? That's what we want

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1 to know from the evidence. That's what we want to know from
2 the discovery.

3 The other highlighted paragraphs here say that there's
4 evidence, there is evidence, that official Saudi entities and
5 associated non-governmental organizations provide financial and
6 logistical support to individuals in the United States and
7 around the world, some of whom are associated with terrorism.
8 And then it says that the Saudi government and many of its
9 agencies have been infiltrated and exploited by individuals and
10 others sympathetic to Al Qaeda.

11 So this document shows that the Saudi government is
12 providing support to Al Qaeda before 9/11, that there are
13 elements within the government, elements that we've shown, for
14 working through this mosque in Los Angeles to fund Al Qaeda,
15 working through Abdi Mohamed, Thumairy and Bayoumi to support
16 Al Qaeda.

17 Now, the 2015 Review Commission that was cited said
18 that the investigation is ongoing and they supported the
19 ongoing investigation. And the standard for us in this case,
20 they're looking at it from the perspective of a criminal case,
21 your Honor. Our case is not a criminal case. We have a civil
22 case. Our burden is not the same as for the FBI, in terms of
23 proving a case against the perpetrators.

24 Our burden is a civil law burden of a preponderance of
25 the evidence. So our evidence can very well justify our case,

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1 where it may not be enough for the FBI to decide they want to
2 prosecute Thumairy or go after -- you know, something that's
3 going to cause an international incident with Saudi Arabia.

4 If I could turn quickly to specifically in terms of
5 the charities, there's two essential arguments that we have,
6 and in terms of our allegations in our complaint. One is that
7 Saudi Arabia knew, when it was giving money to the charity,
8 there was knowledge on the part of Saudi Arabia when they
9 knew -- when they gave money, that they knew it was going to
10 Al Qaeda, that's one element. And the second is that the
11 charities were the alter ego of the government.

12 Now, how do we know that Saudi Arabia knew money was
13 going to Al Qaeda? We have alleged a funding scheme through
14 the IIRO. Mr. Carter mentioned it before. And it was going on
15 for about ten years prior to 9/11. The Saudi government had
16 donated every year, and in the last full year before 9/11,
17 donated \$4 million to this orphan program for the IIRO. And
18 they weren't a passive contributor to the IIRO. They were
19 actually, according to other documents, the Saudi embassy in
20 Pakistan was steering the work of the IIRO in Pakistan.

21 And we know, as mentioned before, that the IIRO was
22 sponsoring the training camps in Pakistan, where the terrorists
23 went and received their training so that they would be capable
24 to perform the hijackings that they performed and the acts that
25 they performed.

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1 And we also know that for at least ten years there was
2 fraud going on inside the IIRO. They were writing false
3 paperwork, and in this false paperwork, they were trying to
4 hide the trail of the money. There was a man named Fadl, who
5 came forward. He was a defector from Al Qaeda, and he revealed
6 that the charities, they had whole lists of orphans that were
7 fraudulent, and instead of the money going to orphans, the
8 money was going to Al Qaeda. This was back in the early 1990s.

9 And in 1997, it came out eventually, it became public,
10 and in 1997, the head of the Muslim World League, the IIRO,
11 their associated organizations, and in Pakistan they operate
12 together. The head of the organization said, well, we
13 acknowledge that funds have been misused in the past, but it's
14 a closed chapter. It's not going to happen anymore.

15 (Continued on next page)

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1 MR. POUNIAN: That head of the charity was also a
2 minister of Saudi Arabia. He held a ministry level position in
3 Saudi Arabia. He made that statement in 1997. In our
4 discovery in this case, we obtained documents from the
5 charities in Pakistan, the Pakistani authorities were
6 investigating the IIRO for fraud.

7 They required that the investigator come in and they
8 hired Ernst & Young to come in and look at the paperwork of the
9 charity. Ernst & Young did a report from 1996 to 2001 in which
10 they went through all the files of the charity and they found
11 out that the same phony paperwork was going on, the same
12 problem. They found fake invoices, they found fake receipts,
13 and they found that over half of the money that was supposed to
14 be going to the charity was being lost.

15 We have alleged and we think there is reasonable basis
16 to believe more than plausible allegations that the money went
17 to Al Qaeda given the history and that Saudi Arabia was a
18 knowing participant in that scheme, that they knew the money
19 was going, and that it is the money that funded the training
20 camps.

21 Now, in terms of alter ego, we have shown in our
22 papers that all levels, in terms of the Muslim world IIRO, our
23 discovery in this case is still ongoing. We need right now
24 to have further discovery to complete our discovery before
25 responding to the motion. That was the requirement set forth

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1 by the Second Circuit in the First City case and a prior case
2 involving Iran where the defendant in the case was the
3 government of Iran and a party that was alleged to be the
4 alter ego. The Second Circuit said, you've got to finish the
5 discovery of the alter ego first before we decide the
6 jurisdictional issue.

7 The same is true here. We need discovery of the
8 alter ego and we need discovery of Saudi Arabia. What we now
9 know from the Muslim World League and the IIRO, we have gotten
10 documents and we have detailed the top to bottom control from
11 the highest levels on down to the lowest levels. I can detail
12 it to the court. It is in our papers, but they were appointed
13 the charity -- it is not only a matter of the top level of
14 appointing people, but it is the lower level doing the project
15 and grant decisions, hiring, firing employees, budgeting
16 finances, aid distribution, handling office space, fund
17 raising, all the elements of running the charity, the
18 purchasing decisions. All of these things were handled by
19 government employees. The cases cited by Saudi Arabia are
20 completely different. There is no elements of actual proof
21 showing influence and control like we have shown here in our
22 papers from the discovery so far in this case, although alone
23 the discovery we have yet to receive from Saudi Arabia.

24 I mentioned before the Al Haramain. We have Saudi
25 Arabia has Al Haramain documents. They were found to be an

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1 Al Qaeda organization admittedly by Saudi Arabia. We have also
2 asked discovery of the hijackers' passport files because Saudi
3 Arabia was cleansing the passports of the hijackers so that
4 they could get U.S. visas. We have asked for information about
5 the embassy in Afghanistan, how it came to be that the embassy
6 was taken over and became an Al Qaeda guest house during the
7 Taliban reign, how Saudi Arabia allowed Al Haramain and
8 Al Qaeda to take over the embassy, the money laundering and
9 using a construction company in Bosnia, overpaying them
10 hundreds of thousands of dollars, and the construction company
11 was controlled by a founder of Al Qaeda and two other Al Qaeda
12 members, all of whom are defendants in this case. We haven't
13 had a chance to take their depositions yet, but we plan to and
14 that will be evidence that we will use in the case and evidence
15 that we need before we can respond to the motion.

16 Let me close, your Honor, with a quote from this court
17 from its decision in 2010. You said -- this is a hard word to
18 say -- "The Labyrinthian means by which Al Qaeda receives
19 material support will not act as a shield to protect the
20 providers of the support from liability." I think the same is
21 true here, your Honor. The complex facts, the complex proof to
22 evidence that we need that is essential for the families to
23 properly present their case before the court, to properly
24 answer the jurisdictional challenge that has been raised. The
25 congress in JASTA intended for families to have that discovery,

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1 to have that free access to the courts to pursue their claims
2 before your Honor.

3 Unless the court has any questions.

4 THE COURT: No. Thank you.

5 MR. POUNIAN: Thank you very much, your Honor.

6 THE COURT: If you have more than two minutes, let's
7 take a break, and we can finish up before we start the
8 argument.

9 MR. KELLOGG: That's fine.

10 THE COURT: Let's come back at 2:10 and we'll pick up
11 and finish this, and then we'll go into the other argument.

12 (Luncheon recess)

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AFTERNOON SESSION

2:15 p.m.

JUDGE DANIELS: Let's see if we can line up this morning.

MR. KELLOGG: Thank you, your Honor. I will be quite brief.

Mr. Carter's prominent theme of his talk was that JASTA has changed the landscaping in all sorts of ways. I want to make sure the ways in which JASTA has not changed the landscape. First of all, it has not changed the presumption of immunity that a sovereign nation enjoys, which can be overcome only if plaintiff satisfies specific exception to that immunity.

Second, it does not change the Supreme Court's decision in *Helmerich and Payne* saying that even if the merits and jurisdiction overlap, even if the elements overlap, the court must resolve and make findings on the jurisdictional elements before exercising jurisdiction. The elements here are a tortious act committed by an agent or employee of Saudi Arabia within the scope of their employment. It caused the 9/11 attacks.

Another thing that has not changed is the burden of proof, which is clearly on the plaintiffs both to come forward with allegations, nonconclusory concrete allegations sufficient under Iqbal and other cases to make out a claim that

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1 jurisdiction is satisfied, as well as where jurisdiction is
2 disputed, coming forward with evidence.

3 The Second Circuit, we cited a number of cases holding
4 that most recently, in the Vera v. Cuba case, a case in which
5 the plaintiffs were trying to invoke an exception that allowed
6 them to pursue somebody who had not been designated a state
7 sponsor of terrorism if the act occurred before their
8 designation, and they were designated in part because of that
9 act. He claimed her father had been tortured and killed by
10 Cuba and that that was one of the reasons Cuba had been
11 designated to state sponsor of terrorism. He even put in an
12 affidavit from an expert saying, in my opinion, that is what
13 happened.

14 The court flatly rejected that. It said in order to
15 invoke the terrorism exception of the FSIA, Vera had the burden
16 to establish that Cuba was designated a state sponsor of
17 terrorism in 1982 as a result of his father's death. It goes
18 on, it says because the record contains no evidence that
19 specifically links Cuba's terrorist designation to Vera's
20 father's death, Vera failed to meet his burden to establish
21 that the terrorism exception applied. So too here, they have
22 the burden of coming forward with evidence to show a tortious
23 act by an agent or employee acting within the scope of their
24 agency that caused the 9/11 attacks.

25 Causation, too, is another matter that has not

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1 changed. Congress used the ordinary word cause. The Supreme
2 Court has repeatedly stated in Burrage and other cases we cite
3 that that means both but-for and proximate cause, as the Ashton
4 plaintiffs conceded.

5 Now, Mr. Carter spent a lot of time talking about the
6 Halberstam case in his effort to show that a recused standard
7 of causation applied. Halberstam, which is from the D.C.
8 circuit, is not a causation case; it is a secondary liability.
9 It is liability for aiding and abetting a principal. JASTA's
10 secondary liability provision does not extend to foreign
11 sovereigns. It applies only to persons. This is in and refers
12 back to the dictionary act of the definition of persons. The
13 dictionary act does not include sovereigns in the definition of
14 persons, so Halberstam is completely irrelevant here.

15 Mr. Carter argues that as long as Saudi Arabia gave
16 money to a charity that it turned diverted funds to Al Qaeda,
17 that they can be responsible for that. JASTA did not change
18 the causation requirements in that respect. It would not be
19 tortious unless they had evidence that the Kingdom actually
20 knew or was recklessly indifferent to the diversion, and it
21 doesn't satisfy proximate cause as the Second Circuit has held
22 expressly in both the Rothstein case at 708 F.3d 82 and
23 Terrorist Attack VI, in this very case, where they said
24 allegations that you gave money to a charity who, in turn,
25 diverted it to Al Qaeda are not sufficient to establish

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1 causation.

2 Even if the court were to conclude at their behest
3 that we had a cozy relationship with Al Qaeda, that would not
4 be sufficient in the absence of proximate cause. In any event,
5 it would be flatly contrary to the finding that the 9/11
6 Commission, the FBI, and CIA, and the 9/11 Review Commission
7 that we did not fund Al Qaeda.

8 What does Mr. Carter come up with in the way of
9 evidence? A big huge record. He comes up with one document
10 that he emphasizes to the court, which he says is the CIA
11 document showing that Saudi Arabia was through IIRO funding
12 terrorist training camps in Afghanistan.

13 First of all, that memo attributes to an unidentified
14 clandestine source that the IIRO, not Saudi Arabia, but the
15 IIRO had provided funding for that training camp. It doesn't
16 even endorse it, it just says not a clandestine source says
17 this. It doesn't even talk about Al Qaeda. It just says
18 militant training camps. That is clearly not admissible and
19 not sufficient to drag Saudi Arabia, a sovereign nation, before
20 the court and establish jurisdiction.

21 All of these charities that they were working with are
22 legitimate charities. Even if there was some diversion to
23 Al Qaeda, Saudi Arabia cannot be blamed for that. The second
24 Circuit has made a very high bar for such piercing of the veil
25 or agencies in the EM Limited case. They said it is not enough

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1 to say that the charity was created by the sovereign. It is
2 not enough to say it was funded and supported. It's not enough
3 to say they appointed the leadership. It is not enough if
4 officials served in some positions in the charity. It is not
5 enough if the sovereign sets goals and policies or if they have
6 to seek approval for certain actions or that it has the power
7 to close them down. None of that is enough to reach the high
8 standard of attributing the actions of the charities to the
9 Saudi Arabia. There is no indication that Saudi Arabia ever
10 asked the charities to support Al Qaeda or other terrorists on
11 behalf of the Kingdom.

12 Mr. Pounian picks out one individual largely to focus
13 on and that was be Abdi Mohamed. Yet, despite all the
14 documents back and forth that he mentioned, there is nothing in
15 there that suggests that he was acting to support terrorism
16 within the scope of his employment for Saudi Arabia. There is
17 nothing on causation to show that money that went to the
18 Western Somali Relief Organization, whether that was dirty
19 money or not, that it in any way ended up in the hands of
20 Al Qaeda and financed the 9/11 attacks.

21 We are talking here about the most investigated event
22 in U.S. History. The 9/11 Commission, the FBI, the CIA, the
23 9/11 Review Commission all rejected the suggestion that Saudi
24 Arabia was responsible for that act. Plaintiffs have not come
25 forward with a prima facie case that would justify even

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1 jurisdictional discovery, and they have made no effort to
2 identify specific items that would resolve any jurisdictional
3 disputes that exist.

4 Their allegation, even on their own face, are legally
5 insufficient under Iqbal, but certainly their failure to
6 provide any evidence to counter the findings of the 9/11
7 Commission, the FBI, the CIA, etc., means that the case should
8 be dismissed.

9 Thank you.

10 JUDGE DANIELS: Thank you.

11 Do you have anything?

12 MR. POUNIAN: Nothing further from me, your Honor.

13 JUDGE DANIELS: Thank you.

14 With regard to the second motion, who is arguing that?

15 MR. BERGER: Mitchell Berger for National Commercial
16 Bank. I have two colleagues on the defense side.

17 Thank you, your Honor. With the court's permission,
18 the order of argument on the motions this afternoon will be I
19 will go first for NCB. Mr. Gauch will follow with bin Laden
20 and Mr. Curran for Al Rahji Bank. I have one idea to hand up
21 to the court, if I may.

22 If I may proceed, your Honor?

23 JUDGE DANIELS: Yes.

24 MR. BERGER: I suppose there is some poetic justice in
25 these three defendants being the second act today, because for

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1 all three of the Lloyd's defendants, this is their second act
2 in the 9/11 cases. We have been brought back for an encore
3 after having been through proceedings before your Honor, before
4 the Second Circuit, and up to the Supreme Court. Respectfully,
5 the encore that we are beginning today should be much shorter
6 than the first round of the lawsuits that we went through
7 because, frankly, there is nothing new here and, therefore, the
8 cases can be dismissed on *stare decisis*, which is our primary
9 argument.

10 Based on your Honor's hard work over many years, this
11 court set the foundation for the dismissal of the Lloyd's case,
12 at least against NCB, and my colleagues will speak for their
13 clients and dismissal of all of the other cases that come,
14 Lloyd's complaint. That is because the Lloyd's case makes the
15 same allegations against NCB that your Honor previously held
16 were insufficient to exercise jurisdiction over NCB in the
17 Federal Insurance, Ashton, and other first-round cases.

18 Precisely because this case is a clone of those
19 first-round cases that your Honor dismissed, the judicial panel
20 on multi-district litigation sent this case here over the
21 plaintiffs' objection when they tried to file in the Western
22 District of Pennsylvania and said that they thought that your
23 Honor's primary rulings would enable this court to make short
24 work of these new cases.

25 Now, plaintiffs know it is the same case. They

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1 purposely went to the Western District of Pennsylvania.

2 Mr. Cozen, who is also representing Federal Insurance, knew
3 perfectly well your Honor was presiding over these cases, that
4 these cases were the same as the ones that your Honor dealt with,
5 yet they said they needed to take the case to the Western
6 District of Pennsylvania. They said, Oh, it is because we have
7 new facts and new law, the JPML said, you know what, that is
8 not convincing. They sent the case here.

9 The JPML said because the allegations in Lloyd's were
10 highly similar to those that were made in the first round of
11 cases, that your Honor could both avail itself of the previous
12 discovery record and apply its prior rulings which, as they
13 noted, were affirmed on appeal.

14 Of course, the Lloyd's complaint has been amended
15 since that time, but even those events have borne out the JPML
16 forecast, because even after amendment, there is nothing new as
17 to NCB that was not in the Federal Insurance case, for example,
18 which Mr. Cozen pursued on behalf of the plaintiffs there in
19 the Lloyd's complaint that Mr. Cozen is here pursuing today.
20 This is the same case. That is why *stare decisis* is the right
21 doctrine in order to dispose of these cases.

22 Now, there is really no dispute that at least as to
23 NCB, the amended Lloyd's allegations simply recycle the
24 jurisdictionally deficient allegations of the Federal Insurance
25 and other first-round cases. In order to demonstrate that

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1 lookalike nature of Lloyd's in the first-round cases, we
2 prepared a chart that I gave to your clerk and handed up to
3 your Honor, which was also as attached as Exhibit 1 to our
4 motion to dismiss. On a side-by-side basis, this chart matches
5 up the allegations of the Lloyd's complaint with the
6 allegations of the previously dismissed complaints, which as I
7 noted were pursued by the same lawyers.

8 Now, in their opposition, the plaintiffs had a full
9 opportunity to contest the accuracy by side-by-side comparison.
10 They didn't. What do they do instead? They conceded that
11 their case against NCB is the same one that they advanced and
12 lost in the Federal Insurance and other first-round cases.

13 What do the plaintiffs say? It doesn't really matter
14 that they're the same. We have four reasons why the same
15 results shouldn't apply, why these cases shouldn't be dismissed
16 despite the doctrine *stare decisis*.

17 First, plaintiffs put almost all of their faith in
18 JASTA as the supposed game changer, but that premise is utterly
19 unsound because JASTA is a statute and NCB was dismissed on
20 constitutional grounds, constitutional due process grounds.
21 Statutes cannot change constitutional provisions.

22 Whatever the merit might be as to the arguments that
23 your Honor heard this morning about the impact of JASTA on
24 subject matter jurisdiction under the FSIA, what is clear is
25 that JASTA cannot change constitutional due process. The

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1 statute doesn't even try to, but even if it tried to, it
2 couldn't.

3 The Second Circuit recently reminded us in the Waldman
4 case that federal courts cannot exercise jurisdiction beyond
5 the limits of what the due process clause of the Constitution
6 requires. It was the due process clause of the Constitution on
7 which your Honor based its initial ruling dismissing NCB and on
8 which the Second Circuit in the O'Neill case affirmed that
9 dismissal.

10 Second, of their four reasons, the Waldman decision is
11 the latest war at personal jurisdiction in ATA cases from the
12 Second Circuit. Waldman ratified every single aspect of the
13 earlier O'Neill decision, which affirmed this court's dismissal
14 of NCB. The notion that Waldman somehow helps plaintiffs,
15 which plaintiffs argue is actually preposterous. Under
16 Waldman, just as under O'Neill, there is no jurisdiction over
17 NCB because NCB took no related actions in the United States
18 and NCB did not take any related actions that targeted the
19 United States.

20 Instead, the Lloyd's complaint simply recycles the
21 same two types of actions allegedly taken by NCB outside the
22 United States: One providing financial services to NCB
23 customers outside the United States who, in turn, allegedly
24 supported Al Qaeda, and two, donations to or other support of
25 charities outside the United States that NCB supposedly knew

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1 were conduits to Al Qaeda. Even in the context of the JASTA
2 argument this morning, your Honor, you were asking questions
3 about, isn't it established law that providing indirect support
4 to some entity that, in turn, may have used money or services
5 to assist Al Qaeda, your Honor said isn't that established,
6 isn't it clear that that is not a basis for liability. Well,
7 indeed, further than that, your Honor, it is clear that neither
8 of those two bases, financial services nor support for
9 charities, can be a basis for jurisdiction. That is what your
10 Honor held in Terrorist Attacks IV, that is what O'Neill
11 affirmed.

12 Both this court and the Second Circuit said that those
13 two types of activities -- finances services and charitable
14 support -- did not establish the constitutionally required
15 substantial connection between NCB and the United States forum.
16 Waldman specifically reaffirmed that constitutional requirement
17 of a substantial connection. Waldman also reaffirmed the
18 constitutional requirement that personal jurisdiction cannot be
19 based on alleged acts by third parties because jurisdiction
20 depends on actions taken by the defendant itself, not by third
21 parties that may have some connection with the forum.

22 The third-party rule is particularly important here
23 because when it comes to NCB, plaintiffs put almost all their
24 faith into allegations about Yassin al Kadi, separately
25 represented defendant, and they tried to make allegations about

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1 ties between Kadi, the Muwafaq Foundation, which Kadi ran and
2 NCB.

3 But here are three important things about Kadi and NCB
4 that come out of the O'Neill decision. In the discussion
5 affirming this court's dismissal of NCB, the Second Circuit
6 never mentioned Kadi despite the fact that plaintiffs'
7 allegations about Kadi were the same then as they are today.

8 Second, in returning Kadi to the court for
9 jurisdictional discovery, the Second Circuit never mentioned
10 any alleged connections to NCB, even though that was the same
11 allegation made then as now.

12 Third, when the Second Circuit dismissed former
13 officers of NCB, Khaled bin Mahfouz and Abdulrahman bin
14 Mahfouz, for lack of jurisdiction. They said it is not enough
15 that they had some connections personally with the Muwafaq
16 Foundation. If the ties between an officer of the bank and the
17 Muwafaq Foundation were never enough for jurisdiction over
18 those officers, then you're right, there is no basis for
19 jurisdiction over the bank for whom those individuals served as
20 officers.

21 So the Kadi allegations are simply a distraction.
22 Your Honor previously considered all of them in dismissing NCB.
23 The Second Circuit considered all of them in affirming the
24 dismissal of NCB. There is simply nothing new here. I'll say
25 more about that when we get to jurisdiction. The bottom line

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1 is that actions by Yassin and Kadi are not actions of NCB
2 itself and, therefore, cannot serve as a basis for personal
3 jurisdiction.

4 Now, Waldman also strictly enforced the limits of
5 personal jurisdiction the Supreme Court set down in the Waldman
6 case. If anything, as a result of Waldman -- Sokolow as it was
7 in the district court -- the parameters for specific
8 jurisdiction are actually narrowed since the time of terrorist
9 attacks. That means, again, that anything that was not
10 sufficient for jurisdiction under O'Neill, affirming your
11 Honor's dismissal of NCB, that is not enough for specific
12 jurisdiction now, now that the parameters for specific
13 jurisdiction have narrowed.

14 Third, as I mentioned, plaintiffs agree that their
15 allegations against NCB are the same ones that did not support
16 jurisdiction over NCB in their earlier cases, so at least give
17 them credit for some self-awareness. They concede the
18 allegations in the first amended complaint, Lloyd's first
19 amended complaint, relative to NCB "admittedly share more
20 similarities with prior claims than do plaintiffs' claims
21 against Al Rajhi Bank and Saudi Binladin Group."

22 Beyond that connection, the plaintiffs make only the
23 most half-hearted attempt to say there is nothing new here.
24 All they do is point to the testimony of Zacarias Moussauoi.
25 Other than that, they never contest the chart that I gave to

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1 your Honor, which makes a side-by-side comparison and shows
2 that the allegations today are precisely the same as the
3 allegations previously, which were not enough to support a
4 jurisdiction over NCB.

5 So that leaves Zacarias Moussaoui. It only requires a
6 moment's thought. Even if the court made the truly heroic
7 assumption that Zacarias Moussaoui is lucid in reading his
8 testimony, gives plenty of reason to question that he is. He
9 didn't say anything jurisdictionally meaningful about NCB. You
10 know this because plaintiffs twice mischaracterize his
11 testimony; first in their first amended complaint, then in
12 their opposition to the motion to dismiss.

13 What plaintiffs say in the first amended complaint is
14 that Moussaoui's testimony confirmed the use of NCB by wealthy
15 Saudi businessmen to transfer large sums of money to Al Qaeda.
16 In fact, all Moussaoui said was some company "the name of which
17 I don't recall" had an account at NCB and sent money "from
18 Jeddah Saudi Arabia to Karachi Pakistan that someone used to
19 "buy material."

20 Now, that is the testimony that the court has to
21 grapple in deciding this motion, not a mischaracterizing
22 allegation. The law is clear that when there is an actual
23 source of something alleged in the complaint, the actual source
24 trumps the allegation itself. So even if you credit
25 Moussaoui's testimony, at the very most, all he says is that

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1 some customer of NCB used the same routine financial services
2 that NCB offers to every one of its customers.

3 The Second Circuit in O'Neill held, affirming your
4 Honor, that as a matter of constitutional due process law,
5 jurisdiction over NCB cannot be based on the alleged provision
6 of financial services to overseas customers who, in turn,
7 allegedly aided request. Your Honor alluded to some of that
8 testimony this morning during the arguments as to the Kingdom.

9 That is three of their four points. Fourth, and
10 finally, what the plaintiffs say is something that occupied a
11 lot of time this morning, but need not occupy a lot of time as
12 to NCB. They say, wait a minute, we have got a favorite
13 refrain, we need jurisdictional discovery. As to NCB, a
14 jurisdictional discovery request has to hit a brick wall
15 because we went through five years of jurisdictional discovery,
16 supervised by Judge Maas, before your Honor granted leave for
17 us to renew our motion to dismiss and then dismiss NCB. Your
18 Honor upheld every single jurisdictional discovery ruling made
19 by Judge Maas.

20 Many of the jurisdictional discovery requests that
21 Judge Maas dealt with and that your Honor dealt with were
22 propounded by the Federal Insurance plaintiffs, by Mr. Cozen's
23 clients then, and he is here representing Lloyd's now. The
24 jurisdictional discovery theory that the Federal Insurance
25 plaintiffs advanced then is the same as the one they are

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1 advancing now. We need discovery related to Yassin and Kadi
2 because of this alleged relationship between Kadi, his
3 foundation, and NCB. Your Honor expressly rejected those
4 jurisdictional discovery requests in Terrorist Attacks IV.

5 The reason why was that your Honor held that, I am
6 quoting here "they would not be of any evidentiary value in
7 establishing specific jurisdiction over NCB because the
8 underlying legal theory is untenable." It is Terrorist
9 Attacks IV, 718 F.Supp.2d 487.

10 Your Honor explained why their legal theory is
11 untenable, which is what your Honor held, "merely helping an
12 organization that is hostile to the United States by providing
13 financial support does not suffice to confer specific personal
14 jurisdiction over a foreign defendant even when it used the
15 received funds to continue to engage in violence." Your Honor
16 held on that basis it was not even a prima facie case of
17 personal jurisdiction over NCB and, therefore, denied further
18 jurisdictional discovery and dismissed NCB.

19 Now that has to be the same conclusion that the court
20 has to reach today, because the Lloyd's allegations are, as our
21 side-by-side chart shows, the same as the allegations your
22 Honor grappled with in Terrorist Attacks IV. The one
23 conclusion that is possible is that now, as then, the
24 plaintiffs have not made out a prima facie case of personal
25 jurisdiction over NCB. Because at the end of the day, the

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1 Lloyd's allegations fall entirely into the same two categories
2 that the Second Circuit and your Honor said were insufficient
3 for jurisdiction: Financial services to overseas customers and
4 support for overseas charity.

5 To put it mildly, it is outrageous that the
6 plaintiffs' first strike to out run this court by filing a
7 lookalike case in the Western District of Pennsylvania so that
8 they can try to take another run at issues that your Honor had
9 already decided based on the same allegations, and it is
10 oppressive. Now that the JPML has sent this case to this
11 court, for plaintiffs to say, you know what, we need a complete
12 do-over, there is absolutely nothing new here. The JPML
13 anticipated that. They said, therefore, it is efficient to
14 have this case in front of Judge Daniels who has made rulings
15 on these issues. It is efficient to have this case in front of
16 him because of the prior record that was available. Indeed
17 they said, you know what, we don't even buy your argument that
18 transferring this case to Judge Daniels will -- and I am
19 quoting the JPML -- the plaintiffs said that transferring here
20 would unduly train the resources of this court. Hence, the
21 JPML rejected that argument as well.

22 Happily, the doctrine of *stare decisis* is
23 purpose-built to put an end to this second run of the same case
24 against NCB. As another court said, it is as clear as clear
25 can be that the same issue presented in a later case in the

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1 same court should lead to the same result. It is the FedEx
2 case that we cite both in our opening brief and in our reply
3 brief.

4 Your Honor, respectfully, it is time to call a halt to
5 this oppressive second round of lookalike cases against NCB.
6 We respectfully request that the court apply its prior rulings,
7 the O'Neill rulings, and dismiss NCB from all of these cases.

8 Thank you, your Honor.

9 JUDGE DANIELS: Thank you.

10 MR. GAUCH: May it please the court. James Gauch,
11 Saudi Binladin Group.

12 Our motion to dismiss raises both absence of personal
13 jurisdiction and failure to state a claim because we have been
14 previously dismissed on personal jurisdiction for the reasons
15 that I'll explain. Those should be dispositive here as well.
16 I intend to only address personal jurisdiction and then turn
17 the podium over to Mr. Curran who will be discussing, again,
18 overlapping issues with respect to failure to state a claim. I
19 am happy to entertain any questions that the court has.

20 For us, the personal jurisdiction argument is
21 straightforward. As you already heard, we are in a very
22 similar position of NCB. After four plus years of
23 jurisdictional discovery, we made a motion to this court, which
24 this court granted, finding in absence of personal jurisdiction
25 specifically finding in absence of any allegations that would

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1 support an inference that we had, that Saudi Binladin Group had
2 purposely directed its conduct at the United States for
3 purposes of specific jurisdiction.

4 That decision went up to the Second Circuit. The
5 Second Circuit affirmed. There has been no relevant change of
6 law. There are no jurisdictionally significant facts, new
7 facts, and I'll address that in a moment. Therefore, the prior
8 decision compels the same conclusion here.

9 In arguing in their opposition brief that somehow
10 either JASTA or Waldman has changed the legal analysis
11 applicable to personal jurisdictions. It is remarkable that
12 the plaintiffs spend virtually no attention to the previous
13 decisions of this court, of Judge Casey, and of the Second
14 Circuit on exactly these facts in exactly this case.

15 In fact, their five-page statement of standards
16 governing personal jurisdiction says virtually nothing about
17 Terrorist Attacks VIII, Terrorist Attacks III, or your Honor's
18 decisions. But one thing has become clear in this litigation.
19 Over and over again, both this court and the Court of appeals
20 have explained, that for purposes of specific jurisdiction, the
21 defendant, the particular defendant, must engage in conduct
22 that is expressly aimed at the United States or purposely
23 directed. They mean the same thing. One comes from the Burger
24 King case, the other comes from Calder v. Jones.

25 The Second Circuit has made that abundantly clear.

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1 This court, in the opinion that we refer to as Terrorist
2 Attacks IV, further elaborated in the terrorism context that
3 what this means is that the defendants' conduct must be
4 intended to directly aid in the commission of a terrorist
5 attack with knowledge that the brunt of the injuries will be
6 felt in the United States. The Second Circuit has embraced
7 that, the Solicitor General, whom the plaintiffs rely, has also
8 embraced that standard. That is the standard that controls
9 personal jurisdiction in this case.

10 Plaintiffs have filed a new complaint which, with
11 respect to SBG, repeats virtually the same allegation over
12 again. Like the other defendants, we attached a chart to our
13 brief. Two columns: The column on the left states verbatim
14 the allegations specific to SBG in the Lloyd's amended
15 complaint, and on the right we quote verbatim, again, the
16 allegations from the prior litigation, from prior statements,
17 from their summary of allegations, summary of evidence that
18 they submitted at one point and from their briefs in the
19 Second Circuit.

20 You can see that, overwhelmingly, they line up often
21 word for word, but substantively they are virtually identical.
22 Plaintiffs cover a lot of ground in that complaint as they did
23 in their prior complaints. We did not in our briefs make an
24 effort to respond to each and every one, all of that is in the
25 prior record, but there are two themes to overriding claims on

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1 which they have relied.

2 One is alleged pre 1993 support in Sudan or elsewhere
3 that they allege Saudi Binladin Group gave, which they have
4 asserted because of what they refer to as the strong familial
5 ties -- they have a few other ways of expressing it as well --
6 put SBG uniquely on notice of Al Qaeda's anti-U.S. aims by, I
7 think they say, 1990 at the latest, if not 1988.

8 The second theme is that after -- I won't restate the
9 history, as your Honor well know from the earlier briefing,
10 Osama bin Laden had been a shareholder with roughly a two
11 percent stake in the Saudi Binladin Group until 1993. At that
12 point, the company voted to remove him as a shareholder. That
13 removal was completed 1994. So this 1993-94 time period is a
14 critical break. The plaintiffs have consistently, in the prior
15 litigation and now, asserted that SBG continue to provide
16 support to Osama bin Laden thereafter. Those are the two key
17 themes, both of which your Honor specifically addressed in the
18 prior opinion dismissing Saudi Binladin Group.

19 With respect to the pre 1993 support, the court
20 observed that that was expressly acknowledging that the
21 plaintiffs argued about the strong family ties, etc. This
22 court accepted, and all that said that regardless, it is too
23 remote from the 9/11 attacks to provide that expressly aimed
24 at the United States conduct that is required for specific
25 jurisdiction and with respect to the continuing assertions of

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1 ongoing support. This court also found that there were no
2 facts to support that the last time we were here.

3 Those conclusions remain true today. There is nothing
4 in the record that establishes that we did expressly aim our
5 conduct at the United States through either of those means.

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1 MR. GAUCH: Now, there are several allegedly new
2 things that the plaintiffs bring up, but I want to address each
3 of them briefly; although they're covered in our briefs. The
4 first -- I would distinguish three different ones. The first,
5 in paragraphs 299 and 300 of their complaint relates to a
6 document, a so-called will of Osama bin Laden that was captured
7 in the raid at Abbottabad in which Osama bin Laden writes to --
8 writes that he describes monies that he received including
9 allegedly money that he received from the Binladin Group for
10 investment in Sudan, and he describes some other funds, as
11 well. And he asked his family to -- he expressed his hope that
12 that money would be used for jihad.

13 Now, the document, plaintiffs' say the documents were
14 written in the late '90s, who knows. When a document was
15 written doesn't matter. The critical thing is what is the
16 conduct -- if you take it as true, what is the conduct of SBG
17 that they're describing. That conduct, of course we well know
18 because plaintiffs have had discovery on Saudi Binladin Group's
19 activities in the Sudan. They were engaged in some
20 construction projects in the Sudan in the early '90s. Those
21 are the ones that your Honor expressly addressed in a prior
22 opinion, finding that they were too remote to support
23 jurisdiction.

24 This is clearly a reference to the same conduct,
25 conduct that this Court has already found to be inadequate, and

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1 I would submit that the fact that the document itself, as the
2 plaintiffs acknowledge, refers to SBG's investment in Sudan,
3 you couldn't get farther removed from targeting United States
4 than that. And whatever Osama bin Laden ultimately hoped that
5 money would later be turned to, there's nothing in the
6 documents and there are no other facts that they've alleged to
7 suggest that somehow SBG was involved in that later period.

8 Then there are two aspects of Zacarias Moussaoui's
9 testimony that they focus on in their complaint. The first in
10 paragraphs 305 and 307 deals with the whole idea that SBG --
11 that we refer to it in shorthand -- the family break in 1993.
12 We have put -- there's been discovery and there's evidence in
13 the record in the prior case about the removal of Osama bin
14 Laden as a shareholder of the Saudi Binladin Group.

15 The testimony that they now quote doesn't cast any of
16 that into question. Instead, plaintiffs' counsel asked
17 Mr. Moussaoui whether the family, the bin Laden family, had
18 broken off all ties with Osama bin Laden, and he said that was
19 a complete lie. Of course, it's a complete strawman because
20 there has been discussion in this case -- we debated this back
21 in jurisdictional discovery -- about family visits and other
22 contacts between the two of them. The issue is not the
23 contact. The issue is support. There is nothing there that
24 suggests support.

25 The one thing in their complaint that they zero in on

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1 is this idea of the spare part, and I want to underscore this
2 for your Honor because there's a critical distinction here
3 between what they allege and what the document they're
4 representing actually says. So in paragraph 306 they allege
5 that Saudi Binladin Group provided spare parts that were used
6 to build training camps for the 9/11 hijackers in Afghanistan.

7 They say that that's what -- they say that,
8 specifically, Moussaoui testifies to that. Now, nobody debates
9 that your Honor can look at the actual testimony when a
10 document like that or testimony is referred to in the
11 complaint. What Moussaoui actually said, he referred to a
12 spare part that was bought in Jeddah, which is where Saudi bin
13 Laden -- Jeddah, Saudi Arabia, which is where Saudi Binladin
14 Group is headquartered.

15 Then that part was then sent -- he doesn't say by
16 Saudi Binladin Group. We don't know who, but that it was sent
17 to Pakistan. That's all he said. The idea that this part was
18 used to construct training camps, the idea that those training
19 camps were then used by 9/11 hijackers, and the idea that SBG,
20 even if that were true, was aware of that, is all made up by
21 the plaintiffs.

22 And this is exactly what we talk about when we say
23 that it is impermissible to layer inference upon inference and
24 get from a simple fact to something clearly they're trying to
25 meet the jurisdictional test and they're trying to meet the

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1 concern that your Honor expressed this morning by somehow
2 tieing it back to the 9/11 hijackers. But there's nothing of
3 that kind in the testimony that they're relying on. They can't
4 simply assert that. That is at least three layers of inference
5 that your Honor would have to fill in for them, for which
6 there's no factual support.

7 So in light of that, the new evidence doesn't -- the
8 assertedly new evidence doesn't change the arguments and the
9 conclusions this Court reached six years ago, which is that
10 even if you take the allegations that they've put in front of
11 you as true, there is nothing that establishes that the Saudi
12 Binladin Group expressly aimed its conduct at the United
13 States. There's nothing to suggest that it directly aided, as
14 your Honor framed the standard in the commission of a terrorist
15 attack, with knowledge that the brunt of it would be felt in
16 the United States. There's nothing even close.

17 They are going over the same old ground that they
18 did -- if you look at the old briefs and you look at the new
19 briefs, the themes are exactly the same. The theme that the
20 Saudi Binladin Group, because they are bin Ladens, which I
21 can't deny, that somehow they had a special relationship and so
22 anything that they did, as far back as 1988, is somehow
23 attributable to 2001 and the heinous terrorist attack here, but
24 they can't get there.

25 The Second Circuit has said time and again that you

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1 need more than simply the assertion. You need more than the
2 argumentative inference that's based on nothing but their own
3 speculation. And because they have not established anything
4 that, even if true, would get them to a prima facie case of
5 jurisdiction. These supposed new facts don't warrant yet
6 another round of jurisdictional discovery.

7 Even if you assume what Moussaoui said was true about
8 that spare part, that doesn't supply the necessary connection
9 to establish jurisdiction. Even if you assume that the
10 document they present as OBL's will is what it says and means
11 what it says, none of that establishes SBG's conduct directly
12 to the United States. It doesn't make a prima facie case. If
13 they could prove it, it doesn't establish jurisdiction, and for
14 those reasons we respectfully submit that the Court should
15 dismiss us again. Thank you.

16 THE COURT: Thank you.

17 MR. CURRAN: Good afternoon, your Honor. Christopher
18 Curran of White & Case for Al Rajhi Bank. I join in the
19 12(b)(2) personal jurisdiction argument that Mr. Burger and
20 Mr. Gauch have just presented and submit that Al Rajhi Bank,
21 like their clients, does not face factual allegations showing
22 that they have committed tortious acts expressly aimed at the
23 United States.

24 But, your Honor, last time Al Rajhi Bank was through
25 this litigation, Al Rajhi Bank was dismissed not for 12(b)(2)

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1 personal jurisdiction, but 12(b)(6) failure to state a claim.
2 This Court, Judge Casey, dismissed the claims against Al Rajhi
3 Bank, and then it, of course, went up to the Second Circuit and
4 the Second Circuit applied the Rothstein case on proximate
5 causation and dismissed Al Rajhi Bank there.

6 The Second Circuit found that there were no factual
7 allegations that Al Rajhi Bank participated in the 9/11 attack,
8 otherwise supported Al Qaeda directly, or that it donated money
9 to charity, and such money was then passed on to Al Qaeda for
10 support for the 9/11 attack. And on that basis, Al Rajhi Bank
11 was dismissed for lack of proximate causation.

12 So just like the Binladin Group and just like NCB,
13 we're back again now in this litigation. We submit that the
14 holding of the Second Circuit still controls and provides the
15 sound basis for the dismissal of Al Rajhi Bank again.

16 Now, the plaintiffs, of course, resist that
17 conclusion, and they say there are some new things that
18 differentiate the situation now from what pertain in the last
19 round of litigation. And specifically, they say that their
20 allegations are different in certain respects and that the law
21 is different in certain respects; so I'd like to address those
22 two assertions seriatim.

23 First, as to this supposedly new allegations, all but
24 one of the supposedly new allegations come from a 2007 Wall
25 Street Journal article. Now, the sequencing, the timeline here

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1 is kind of important. Al Rajhi Bank was dismissed by Judge
2 Casey in 2005. That dismissal order was not final. It was a
3 non-final decision, still subject to change under the rule 54B
4 of the Federal Rules of Civil Procedure. So there was no
5 appeal taken at that time. The litigation continued as to
6 other defendants.

7 In 2007, the newspaper article came out. The
8 plaintiffs assert that that newspaper article contains new
9 material. We disagree with that. We think that's just a
10 retread of old allegations, but even if there was something new
11 in there, it doesn't matter because in 2010, the plaintiffs, in
12 the last round of litigation, added that Wall Street Journal
13 article and the accompanying CIA report excerpt to the record
14 and made arguments based on that.

15 Then, in 2011, Judge -- well, your Honor made Judge
16 Casey's dismissal order final. At that point, the appeal went
17 to the Second Circuit. At the Second Circuit, the plaintiffs
18 relied expressly on that Wall Street Journal article in
19 alleging that Al Rajhi Bank should not have been dismissed.
20 The Second Circuit did not accept that argument and, instead,
21 applied Rothstein to dismiss Al Rajhi Bank. So in other words,
22 what the plaintiffs say is new from the 2007 Wall Street
23 Journal article is not new. It was before the Second Circuit
24 when the Second Circuit affirmed the dismissal based on the
25 Rothstein proximate causation point.

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1 Now, with your Honor's permission, I'd like to hand to
2 your Honor, through your clerk, the brief that the
3 plaintiffs -- an excerpt of the brief that the plaintiffs
4 submitted to the Second Circuit because it will show, in plain
5 black and white, that the Wall Street Journal article was a
6 prominent part of the plaintiffs' argument to that court.

7 So, your Honor, this excerpt shows page 102, and I
8 won't belabor this, and you can see prominently on page 102,
9 plaintiffs' brief refers specifically to the Wall Street
10 Journal report. It uses it to make an argument against Al
11 Rajhi Bank, and it says that the Wall Street Journal report, in
12 fact, isn't new. It says it corroborates the prior allegations
13 against Al Rajhi Bank.

14 So this little excerpt I've handed you proves two
15 important points: No. 1, the Wall Street Journal article was
16 before the Second Circuit and was considered by the Second
17 Circuit when it dismissed Al Rajhi Bank; but also, it confirms,
18 in words from the plaintiffs' mouth, that there was nothing
19 substantively new in the Wall Street Journal article.

20 And that statement by the plaintiffs is correct
21 because all along, the allegations of Al Rajhi Bank have
22 basically fallen into three general buckets: One is that Al
23 Rajhi Bank donated money to charities that, in turn, supported
24 Al Qaeda.

25 Although, there, I would add, your Honor, the only

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1 factual allegation about actual donations by Al Rajhi Bank were
2 three donations in the mid-1990s to Saudi High Commission, and
3 as your Honor hear this morning, the Saudi High Commission is a
4 government-owned-and-operated charity. So it's hardly damning
5 of Al Rajhi Bank to have donated to that charity in the
6 mid-1990s.

7 The second general bucket that plaintiffs' allegations
8 fall under is the provision of routine banking services for its
9 customers. There are some allegations that some of Al Rajhi
10 Bank's two million customers were bad actors, and the
11 plaintiffs tried to make Al Rajhi Bank liable because of the
12 conduct, the alleged conduct of those bad actors. But the
13 courts have consistently concluded that a bank cannot be held
14 liable for the provision of routine banking services under
15 those circumstances.

16 And then the third general bucket of allegations is
17 that Al Rajhi family members, shareholders of the bank, knew or
18 participated in acts that the plaintiffs allege are suspicious.
19 There again, this Court and the Second Circuit found that that
20 category, as well, did not support the basis of the claim
21 against Al Rajhi Bank.

22 So the overwhelming majority of these supposedly new
23 allegations come from the Wall Street Journal article. I've
24 addressed that. The only other assertedly new allegation
25 against Al Rajhi Bank is based on, as we heard from my

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1 co-counsel, an assertion by Moussaoui.

2 As to Al Rajhi Bank, he made a very general comment
3 that's in the complaint and it's addressed in our brief, that
4 Al Rajhi Bank was a "good brother" that has moved money around.
5 That assertion by Mr. Moussaoui, whatever it means, is far too
6 vague and imprecise to be damning of Al Rajhi Bank in
7 supporting a reasonable inference under Twombly or Iqbal of any
8 wrongdoing by the bank.

9 It probably benignly means that Al Rajhi Bank was a
10 sharia-compliant bank and the largest retail bank in Saudi
11 Arabia. So there are no new factual allegations in the
12 complaint here that distinguish this case from the prior case
13 that led to the dismissal in the Second Circuit.

14 Now, turning to the plaintiffs' contention that the
15 law has changed in a material way that distinguishes the prior
16 dismissal. There, of course the plaintiffs are relying on
17 JASTA. Of course, JASTA does add new claims. It provides
18 plaintiffs with the new ability to assert aiding and abetting
19 and conspiracy. But, your Honor, those new claims do nothing
20 to cure the fundamental deficiencies in the pleading against
21 Al Rajhi Bank.

22 Aiding and abetting still requires proximate
23 causation. Why do I say that? For a variety of independent
24 reasons. The statutory language of JASTA, knowingly providing
25 substantial assistance. "Substantial assistance," those words

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1 are very close to what the Second Circuit, in Rothstein, said
2 was the definition of proximate causation. There, they said
3 for something to be proximally caused, it had to be a
4 substantial factor in the responsible chain of causation. The
5 notion of substantiality is common to both the aiding and
6 abetting claim under JASTA and Rothstein.

7 As your Honor knows, the findings that precede the
8 enactment of JASTA in the section of the bill refers to the
9 Halberstam case by the DC circuit. That case also supports the
10 notion that, for an actor to be liable for aiding and abetting,
11 the aiding and abetting must be a substantial factor in the
12 chain of causation. Halberstam says repeatedly throughout its
13 decision that the conduct of the defendant there, who was Linda
14 Hamilton, the live-in companion of the murderer, that her acts
15 were essential, substantial and, indeed, that she was a partner
16 in the commission of the crime through her fencing activities
17 and other actions that enabled the burglaries that led to the
18 murder.

19 So, your Honor, Halberstam -- in addition to the
20 actual language of the aiding and abetting provision in JASTA,
21 Halberstam also supports the notion that substantially and
22 causation is still required.

23 Halberstam also refers to section 876 of the
24 restatement (second) of torts. That provision in the
25 restatement also tells us that general principles of legal

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1 causation are relevant in establishing whether an actor is
2 liable for aiding and abetting. So there again, all arrows
3 point in the direction of proximate causation, or its
4 equivalent, being required under aiding and abetting.

5 And then lastly, your Honor, in our briefs we cite
6 some cases from the Second Circuit and from this court,
7 addressing aiding and abetting in other contexts, specifically
8 the securities laws, where aiding and abetting comes up most
9 frequently. And the decisions of the Second Circuit and this
10 court are uniform in concluding that proximate causation is the
11 test as to whether an actor shall be liable for aiding and
12 abetting.

13 So the Edwards & Hanly case and the Ritchie case,
14 those are the two cases we cite prominently in our reply brief.

15 So there again, as to aiding and abetting, the
16 addition of that as a cognizable claim by virtue of JASTA, does
17 nothing to cure the problem that the Second Circuit found was
18 uncurable on the part of the plaintiffs, and that is the lack
19 of factual allegations supporting that Al Rajhi Bank did
20 anything that proximately caused the 9/11 attacks.

21 As to conspiracy, your Honor, conspiracy -- and I hope
22 I don't spend too much time on this because I think the
23 plaintiffs make only a halfhearted effort to suggest that they
24 have sufficient factual allegations to show that Al Rajhi
25 conspired with Al Qaeda. All I can say -- and perhaps this is

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1 echoing some of your Honor's comments during the Kingdom
2 arguments earlier -- that conclusionary allegations of
3 conspiracy don't cut it.

4 There have to be factual allegations that give rise to
5 a reasonable inference, to paraphrase the language of Twombly
6 and Iqbal, that there was an agreement between the alleged
7 co-conspirators. We've got nothing close to that in this
8 complaint. No factual allegations that Al Rajhi Bank formed an
9 agreement with Al Qaeda to engage in terrorist acts or support
10 terrorist acts or to do 9/11 or anything close to that.

11 So there again, your Honor, the asserted bases that
12 differentiate this case here and now from the Second Circuit's
13 dismissal based on Rothstein in 2013, are futile on the part of
14 the plaintiffs.

15 Beyond that, your Honor, if you don't have any
16 questions, I think I'll reserve the rest of my time for any
17 necessary rebuttal.

18 THE COURT: All right. Thank you.

19 MR. CURRAN: Thank you.

20 MR. COZEN: If your Honor please, Steve Cozen for the
21 Lloyd's plaintiffs and others who have joined with us. I feel
22 constrained to simply advise the Court that, to the best of my
23 knowledge, the Waldman case, in its present form, is, for the
24 third time, subject to the request by the Supreme Court for the
25 views of the Solicitor General on the issues raised in that

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1 case. I don't know whether the Court will take certiorari or
2 not, but this is the third time that they have shown
3 significant interest in those issues.

4 So I just thought that, in the event that your Honor
5 wasn't familiar with that fact, that I would make sure that you
6 did know that that was taking place as to Walden. That doesn't
7 in any way, shape or form detract from our reliance on the
8 analysis that Judge Koeltl made in Waldman.

9 Your Honor, it is indisputable that on September 28th,
10 2016, the legal environment that is now applicable, both to
11 jurisdiction and liability in civil terrorism cases changed
12 dramatically. JASTA became law. Additionally, over the last
13 five to seven years, tens of thousands of pages of previously
14 classified documents were declassified by the United States
15 government, and new expert testimony and new witnesses were
16 obtained. New case law on issues which effect civil terrorism
17 cases are now instructive.

18 And the plaintiffs now before the Court are litigating
19 in a far more favorable environment when it comes to the
20 questions of personal jurisdictions, specific personal
21 jurisdiction and proximate causation or causation at all, and
22 that is simply the fact.

23 The defendants have dug deep, as established by the
24 various exhibits and comparisons, to recycle arguments, which
25 sometimes before worked for them, but they worked for them in a

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1 totally different environment, where there was no JASTA. There
2 was no aiding and abetting liability under the ATA. Rothstein
3 was applicable, which it isn't applicable to today. All of
4 those things -- and there are more, and I will get to them --
5 change the perspective that this Court must now bring to this
6 case dramatically.

7 But I am here to say to your Honor that, objectively
8 viewed in light of new law, new facts and new cases, their
9 arguments are illogical. They are inconsistent with the law
10 and the facts which are now before us.

11 There are some key propositions, which I think, your
12 Honor, govern the day. First, JASTA provides plaintiffs with
13 the broadest possible statutory basis for jurisdictional relief
14 in U.S. courts, consistent with constitutional principles. Due
15 process is an issue. It must be addressed. But as JASTA
16 itself said, we want that issue looked at in the broadest
17 possible way, to give the most access to these plaintiffs, who
18 are victims of terrorism -- and I know you already have in
19 front of you the congressional record, which records the
20 statements of Senator Schumer, Senator Cornyn and Congressman
21 Nadler, to name three, which I think are very, very informative
22 in that respect.

23 Second, our factual allegations do not rely upon mere
24 foreseeability as a basis to confer jurisdiction but, rather,
25 specific and general knowledge and intent on the part of the

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1 defendants to aid and abet and conspire with Al Qaeda to harm
2 the U.S. There is no requirement in the law, nor was there
3 before a requirement, that someone who gives aid to a known
4 terrorist, that they have knowledge and intent to participate
5 or aid in a specific act, at a specific time and a specific
6 place.

7 As made clear by congressional findings and purpose,
8 JASTA was adopted to broaden substantive liability standards of
9 the ATA and to encompass theories of aiding and abetting and
10 conspiracy and to eliminate jurisdictional barriers.

11 Now, we agree that JASTA became law in September 2016,
12 and when it did, it didn't change the constitutional
13 requirement of due process for specific jurisdiction. But,
14 your Honor, by its very text, its findings and its purpose in
15 protecting this country and its citizens from acts of
16 international terrorism, it supplied a new context within which
17 to make that decision.

18 You have, I know, before you or in your pile of
19 papers -- and if you want another copy, I'm happy to give it to
20 you -- but you have the JASTA provisions; so you can refer to
21 them. I would simply make note, your Honor, of the following
22 provisions, some of which I will refer to, in JASTA that
23 directly impact upon this Court's decision on the motions
24 before it. That's section 2, relating to findings and purpose,
25 2(a)(3), (a)(4), (a)(5), (a)(6) and 2(b), and under section 4,

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1 which is aiding and abetting liability for civil actions
2 regarding terrorist acts, section 4(a), which refers to the
3 amendment of the Antiterrorism Act under 2333(d).

4 Now, your Honor, it's become apparent to me as I go
5 through all of the cases and as I look at the congressional
6 record and, in fact, spent a good deal of time in those
7 hearings, in front of those congressional committees that gave
8 rise to JASTA; so I heard them with my own ears. After the
9 Second Circuit drew a line as to the nature of the conduct
10 necessary to sustain personal jurisdiction in cases where the
11 defendant aided, abetted or conspired with an international
12 terrorist group, directly or indirectly, what did Congress
13 decide? Congress decided that the courts were wrong and they
14 redrew the line. They redrew the line in JASTA.

15 In setting forth the findings and purpose of JASTA, it
16 said -- and I refer you now, your Honor, to 2(a)(6) -- persons,
17 entities or countries that knowingly or recklessly contribute
18 material support or resources, directly or indirectly, to
19 persons or organizations that pose a significant risk of
20 committing acts of terrorism that threaten the security of
21 nationals of the United States or the national security,
22 foreign policy or economy of the United States, necessarily,
23 necessarily, direct their conduct at the United States and
24 should reasonably anticipate being brought to account in the
25 United States to answer for such activities.

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1 Does it occur to you, your Honor, that when taken in
2 conjunction with 2(a)(5), which instructs that one of the
3 findings and purposes that Congress had here was to apply
4 Halberstam's standards to making the decision as to aiding and
5 abetting liability and to apply it in the broadest possible
6 sense, was exactly what they had in mind when they wrote
7 2(a)(6).

8 That provision alone, 2(a)(6), before language
9 amending the ATA, when laid next to the plaintiffs' complaint,
10 our first amended complaint, compels the conclusion that the
11 well-pled allegations of the amended complaint establish
12 personal jurisdiction under Congress' redrawn lines.

13 Now, that purpose, your Honor, is further explicated
14 in section 2(b). What did that say? The purpose of this act
15 is to provide civil litigants with the broadest possible basis,
16 consistent with the Constitution in the United States, to seek
17 relief against persons, entities and foreign countries,
18 wherever active and wherever they may be found, that have
19 provided material support, directly or indirectly, to foreign
20 organizations or persons that engage in terrorist activities
21 against the United States. Again, that is its purpose.

22 Now, you will recall, your Honor, that as articulated
23 by Chief Justice Roberts in the Humanitarian Law Project case,
24 great deference is to be paid to the experience and analysis of
25 Congress and congressional or government agencies. Here, in

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1 JASTA, Congress found that all contributions, all
2 contributions, to foreign terrorist organizations further their
3 acts of terrorism to the detriment of the national security and
4 economic well-being of the United States.

5 I would further observe that under Humanitarian Law
6 Project, courts should defer to congressional factual
7 inferences and conclusions, and which I think are articulated
8 fairly well not only in the findings and purpose section of
9 JASTA, but also in the congressional record that I know was
10 handed up to you.

11 Defendants ignore, in part, Congress' empirical
12 findings through JASTA confirming a direct nexus between
13 sponsorship of foreign terrorist organizations hostile to the
14 United States, and the resulting harm to the United States.
15 They just ignore that, leave it out of there, but that's what
16 Congress found.

17 Keep in mind, if you will, your Honor, that all of the
18 self-described purposes of JASTA was to correct judicial
19 constructions that Congress felt limited U.S. counterterrorism
20 efforts and undermine national security. Simply stated, after
21 JASTA, folks who knowingly aid and abet international
22 terrorists should reasonably anticipate being brought into a
23 U.S. court to answer when the United States and its citizens
24 are the targets of such terrorists.

25 Doesn't that language kind of ring a bell in terms of

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1 what we expect out of due process? A certain fairness and the
2 idea that when one should anticipate being hauled into court to
3 answer for one's bad acts, that is a relevant consideration, in
4 fact, a determinative consideration when it comes to
5 determining due process, constitutional due process, and I
6 think we can agree, whether on the Fourteenth or Fifth
7 Amendment, it doesn't make a difference.

8 The criteria for personal jurisdiction then goes
9 something like this, if I may: One, if service of process is
10 proper and there is a statutory basis for personal
11 jurisdiction -- and that's not disputed here -- then the only
12 question is whether the exercise of personal jurisdiction
13 comports with due process. Are there minimum contact with the
14 United States, and does exercise of due process comport with
15 traditional notions of fair play? I don't think that's a very
16 disputable proposition.

17 Two, under Calder, actions expressly aimed at the
18 forum, with knowledge that the forum would bear the brunt of
19 the injury support the assertion of personal jurisdiction. I
20 don't think that's a disputable proposition.

21 Now, according to Waldman, the -- with which your
22 Honor has a passing familiarity.

23 THE COURT: Yes.

24 MR. COZEN: According to Waldman, the conduct of those
25 defendants would have had to have been random, fortuitous or

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1 attenuate. That is, the conduct of those defendants -- in that
2 case, of course, we were talking about Barghouti and Faransi
3 and the PLO as aiders and abettors of Hamas. But that conduct
4 has to be random, fortuitous or attenuated in order for there
5 not to be a sufficient connection or relationship which
6 comports with due process, and in order for the Calder test to
7 be met.

8 So I think it's important to take a look at the
9 allegations -- and if your Honor will permit me, I'm going to
10 try to make this brief -- against Al Rajhi Bank, against
11 National Commercial Bank and against the Saudi Binladin Group,
12 and I think you will find, your Honor, that the assertions and
13 the allegations specifically that we make against each of them
14 are not about random, fortuitous or attenuated conduct.

15 Al Rajhi Bank, according to the CIA's 2003 memo, ARB
16 acted as a conduit for extremists financing including Al Qaeda.
17 ARB maintained accounts and accepted donations for Dawah
18 organizations which funded Al Qaeda, including two accounts for
19 a designated sponsor of terrorism, al Haramain. Extremist
20 groups under the Al Qaeda umbrella or affiliate of Al Qaeda,
21 order operatives throughout six Middle Eastern countries to use
22 ARB.

23 Al Qaeda members used accounts at ARB to fund and
24 facilitate terrorist attacks. Zacarias Moussaoui testified to
25 his knowledge that ARB was responsible for moving money around

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1 for Al Qaeda. That was to his personal knowledge, and you
2 either accept him or don't accept him as a credible witness
3 when you try the merits of the case, but not for the purposes
4 of determining the sufficiency of our allegations, for purposes
5 of personal jurisdiction and purposes of stating a claim upon
6 which relief can be granted.

7 ARB, whose chairman was an official of IIRO -- you
8 heard Mr. Carter earlier refer to IIRO and the nefarious role
9 which it played in the extremist world -- maintained numerous
10 accounts for IIRO, which was a major Al Qaeda funder.

11 We heard about some contributions that ARB made over
12 three years to the Saudi High Commission. Well, it happened to
13 be a million dollars, over a million dollars in total, in three
14 years. Suleiman Al Rajhi started and funded an organization
15 called SAAR, S-A-A-R, which sent more than \$26 million in
16 untraceable funds overseas to leaders of Al Qaeda and
17 co-conspirators. SAAR was a state-designated global terrorist,
18 and that's paragraph 186.

19 Now, what about National Commercial Bank? Well,
20 Khalid bin Mahfouz was the major shareholder and CEO of NCB,
21 who collaborated with another outfit called BCCI that was a
22 regular funder of Al Qaeda. He was indicted and paid a
23 \$200 million fine for his participation in their collaborative
24 scheme.

25 Moussaoui, at paragraph 201, testified that Osama bin

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1 Laden picked him to document contributions from NCB. He
2 personally reviewed and documented transactions with NCB.
3 Khalid bin Mahfouz founded the Muwafaq Foundation in 1991. He
4 selected Yassin al Kadi manage it. Al Kadi was a
5 state-designated global terrorist since 2001. NCB provided all
6 financial services for Muwafaq, including funding and
7 channeling of contributions. That's in paragraph 213.

8 There's a key paragraph, your Honor, in the first
9 amended complaint. It's paragraph 234. Khalid bin Mahfouz and
10 Yassin al Kadi, the top dogs at NCB, established Muwafaq
11 Foundation to support Al Qaeda and use NCB, their bank, to
12 deliver to Al Qaeda critical funding, directly and indirectly,
13 with full knowledge of the relationship with Al Qaeda and its
14 goal to attack the United States, which went back at least as
15 far as 1992, when Osama bin Laden issued his fatwah against the
16 United States.

17 The Saudi Binladin Group. In 1989 Sudan offered Osama
18 bin Laden safe haven and training facilities in exchange for
19 building roads and ports by the Saudi Binladin Group in south
20 Sudan. At least from 1992, if not before, the Saudi Binladin
21 Group was aware that Osama had issued the fatwah against the
22 United States, or that his goal was not simply against western
23 civilization but the United States in particular.

24 The Saudi Binladin Group transferred Osama bin Laden's
25 shares to his brother Ghalib in 1993. In 2000, they were

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1 deposited in the amount of \$9.8 million in principal into NCB.
2 But what happened to the distributions over seven years? They
3 are as yet unaccounted for, but they won't be once we get
4 discovery.

5 In March 2016, long after the cases that my friends
6 rely upon have come to fruition. The United States government
7 declassified Osama bin Laden's will, which was part of
8 400-and-some-thousand documents that they obtained in
9 Abbottabad, the raid in Abbottabad. He had \$12 million from
10 Bakr bin Laden, who was running the Saudi Binladin Group, in
11 order to invest in Sudan.

12 Moussaoui says that Osama bin Laden maintained strong
13 ties with his family long after Sudan, to Afghanistan, and they
14 visited regularly. And this is confirmed by something else
15 that came out long after the other cases had been concluded,
16 and that is the 28 pages. Now, it's up to a trier of fact to
17 say whether or not reasonable inferences could be made that the
18 family members, who were running the company and participating
19 with their brother in providing money to build training camps
20 in Sudan and Afghanistan, were doing that on behalf of their
21 brother as a personal matter or on behalf of SBG. I just think
22 that's an issue that ought to be decided by a trier of fact,
23 but at least there's a reasonable inference that that's the
24 case.

25 Therefore, can one truly objectively say that the

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1 detailed alleged conduct of these defendants was random,
2 fortuitous or attenuated? Not under these allegations.
3 Clearly not. Under Waldman, the test is the knowing, aiding
4 and abetting and conspiring of these defendants with Al Qaeda
5 with knowledge that their substantial resources would be used
6 against the United States. That's a logical conclusion, and
7 it's the predicate for personal jurisdiction.

8 The bottom line, your Honor, it seems to me, is that
9 under the allegations of the first amended complaint,
10 defendants knowingly participated in a long-running campaign to
11 support Al Qaeda with an awareness that the brunt of the harm
12 resulting from their witting support of Al Qaeda would be felt
13 in the United States. Every test that needs to be made under
14 the case law relating to personal specific jurisdiction has
15 been made.

16 Plaintiffs have overwhelmingly made a prima facie
17 showing that jurisdiction exists. It is, therefore, clear that
18 the suit-related conduct, you'll recall in Waldman, I think
19 Judge Lowell said, you really have to look at the suit-related
20 conduct. The suit-related conduct of these defendants creates
21 a substantial connection to the United States and sustains the
22 assertion of personal jurisdiction.

23 And I would note, parenthetically, your Honor, that if
24 there was enough of substantial connection for the United
25 States government to consider designating ARB, Al Rajhi Bank,

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1 under executive order 13224, designated foreign terrorist
2 organization, there should be enough to meet a due process
3 standard.

4 The United States government, in one of its amicus
5 briefs in terrorist attacks 8 expressly rejected the notion
6 that the opinion should be read to suggest that personal
7 jurisdiction requires a showing of specific intent to harm the
8 United States. In other words, your Honor -- and I think this
9 brings you back to where you were with Mr. Carter this morning.
10 That is, if you know that there is a likelihood that your
11 contribution will be used for evil directed against the United
12 States, you do not have to have specific knowledge or intent to
13 participate in that specific act at some specific time, at some
14 specific place, in order for these United States courts to
15 assert jurisdiction over you.

16 Indirect support is enough if defendants acted with
17 required knowledge and their contributions would result in an
18 injury that would be felt in the United States. So I submit
19 that JASTA changed the personal jurisdiction inquiry in a
20 number of ways. But importantly, it is the clear judgment of
21 Congress and the counterterrorism community that providing
22 material support and/or financial services or funding to a
23 hostile organization imperils national security and is conduct
24 directed against the United States.

25 So as a consequence, indirect funding of Al Qaeda

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1 through ostensible charities passes muster. The United States
2 government said in one of its amicus briefs that the defendants
3 knew that the brunt of the injury would be felt in the United
4 States or expressly aim their conduct at the United States.
5 They, therefore, acted with the requisite knowledge that their
6 contributions would result in injury felt in the United States.

7 I submit to you, your Honor, that the question before
8 the Court is whether the factual allegations in the first
9 amended complaint, now being judged on the basis of their whole
10 content, their reasonable inferences, JASTA and new case law,
11 whether those factual allegations are sufficient to make
12 plausible the claims that these defendants' contributions of
13 support, whether direct or indirect, were made with the
14 knowledge or reckless disregard for the likelihood that those
15 contributions would be used to support Al Qaeda in their jihad
16 against the United States. I think the answer is clearly yes,
17 and personal jurisdiction has been established. So I submit
18 that the motion to dismiss under 12(b)(2) should be denied.

19 I would like to briefly move on, your Honor, and I
20 will try very much to be brief, to the 12(b)(6) motions, which
21 are only -- it's not National Commercial Bank, but only SBG and
22 ARB. A couple of preliminary comments. Your Honor, one cannot
23 reconcile their arguments with JASTA's textual support for
24 aiding and abetting claims.

25 JASTA, in 2(a)(5) is very clear in directing courts to

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1 apply a flexible causation standard in accordance with
2 Halberstam. Aiding and abetting liability focuses on whether a
3 defendant knowingly gave substantial assistance and, as
4 explained previously, substantial assistance can mean different
5 things at different times in different places. The worst the
6 act of evil by the perpetrator, the minimus the contribution
7 has to be to that perpetrator in order to constitute
8 substantial support or substantial assistance, but knowingly
9 giving substantial assistance to someone who performed a
10 wrongful act, not on whether the defendant agreed to join in
11 that wrongful act or even knew what that wrongful act would
12 specifically be.

13 Under Halberstam, minimal aid constitutes substantial
14 assistance where you have a bad act. It also recognizes
15 liability for conspiracy, even if the co-conspirators'
16 participation was remote and not significant. All there has to
17 be is an implicit or explicit understanding of what was going
18 on in the causal chain in order for there to be enough for a
19 conspiracy.

20 Now, terrorist attacks one and seven, which I heard
21 referred to earlier, were decided before JASTA recognized
22 secondary liability and amended the standard for liability.
23 The defendants, the two defendants who have filed the 12(b)(6)
24 motion, say, well, you haven't given us a scienter, there's not
25 enough of scienter in this complaint.

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1 Well, the only scienter requirement under JASTA is not
2 specific knowledge and intent to participate in a wrongdoing,
3 but whether the defendant acted knowingly or with reckless
4 disregard of the likely consequences, period. That's all we
5 need. Therefore, either knowing provision of material support
6 to a terrorist organization, or deliberate indifference as to
7 whether it did or didn't provide such support, qualifies as
8 intentional conduct. And I believe the EverBank case stands
9 for that proposition as well.

10 We submit that ARB, as in Boyne three, which again was
11 referred to this morning and very properly so, your Honor, we
12 submit that ARB is guilty of primary liability under the ATA
13 section 2331(1)(a). Because under Boyne, and this is
14 pre-aiding and abetting liability under the ATA, but under
15 Boyne, brilliant jurists found that funding and supporting a
16 terrorist is like handing a loaded gun to a child. The act is
17 not in and of itself violent, but is dangerous to human life
18 and satisfies the ATA standards.

19 Now, you'll see in our brief, your Honor, we argue
20 that material support and financing for Al Qaeda of the type
21 prohibited by 2339(A) to (C) constitutes a direct cause of
22 action and primary liability. We have clearly met our burden
23 of causation for primary liability as well. The Court said in
24 Boyne three, a relaxed causation standard is necessary for
25 primary liability.

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1 Is it reasonably related or is it reasonably connected
2 under ATA? Because if you apply and think of this, your Honor,
3 if you try to apply more stringent causation standards, even
4 traditional causation standards in this terrorism world, you
5 would simply leave people without a remedy, given the
6 difficulty of tracing donations to specific events.

7 The broad test for aiding and abetting liability under
8 Halberstam is required by JASTA. Simply, the party aided must
9 perform a wrongful act, the defendant must be generally aware
10 of his role, and as part of the overall legal or tortious
11 activity at the time of the assistance, and the defendant must
12 knowingly and substantially assist in the principal's
13 activities. I think that is clearly laid out in our complaint.

14 ARB and SBG both find that lack of adequate plausible
15 allegations of proximate causation compel 12(b)(6) dismissal.
16 Your Honor, they're dead wrong, and it's illogical. It is true
17 that the "by reason of" language in 2333(a) of the ATA requires
18 a showing of proximate cause. No doubt about it. But you see,
19 what happened in 2010 is that Rothstein first concluded that
20 there was no aiding and abetting liability under the ATA, which
21 allowed it to adopt a more stringent proximate causation
22 application.

23 With the addition of JASTA and, therefore, the
24 amendment of 2333 to add 2333(d), aiding and abetting under
25 JASTA, now what do you got? One, aiding and abetting liability

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1 exists. Two, the 9/11 attack by Al Qaeda was an act of
2 international terrorism by a foreign terrorist organization; so
3 the "by reason of" standard is met.

4 And, three, liability for aiding and abetting now
5 under JASTA and under the JASTA amendment requires only knowing
6 provision of substantial assistance or conspiracy, all in
7 accordance with the broad standards of liability laid out by
8 Judge Wald in Halberstam. I submit, your Honor, that all of
9 the elements of liability or aiding and abetting the
10 conspiracy, as well as the necessary elements for primary
11 liability under the ATA, after a careful reading of the first
12 amended complaint, laying JASTA on the same table next to it
13 and looking at the correct interpretation of Waldman, lead to
14 the inexorable conclusions that the 12(b)(6) motions should now
15 be denied. Thank you, your Honor.

16 (Continued on next page)

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1 MR. BERGER: Thank you, your Honor. Mitchell Berger
2 again for National Commercial Bank.

3 Mr. Cozen concedes that the allegations against NCB
4 are the same. What he gave you was a motion for reargument of
5 Terrorist Attacks IV, because the allegations that he pointed
6 to involve Khalid bin Maufouz in BCCI which, by the way, deal
7 with actions that allegedly occurred in the 1980s, a time
8 before the 2001 attack. They are verbatim, the same, in the
9 Lloyd's complaint as they were in the Ashton complaint, the
10 Burnett complaint and the Federal Insurance complaint. He has
11 nothing new to offer you factually. He concedes that.

12 He says, your Honor, I only have two things to offer
13 you. I don't have any new facts or allegations. One, Waldman,
14 he says, stands for the proposition that specific jurisdiction
15 exists unless the defendants' actions were random, fortuitous,
16 or attenuated. I am going to say he has a different copy of
17 the Waldman decision than I do.

18 What Waldman did say, and we lay this out, your Honor,
19 specifically on page eight of our reply brief, Waldman ratified
20 O'Neill, which ratified Calder, in holding that when you have a
21 defendant like NCB who engaged in entirely overseas activities,
22 that there is no specific jurisdiction over that defendant
23 under the due process clause, unless there are overseas actions
24 expressly aimed or purposely directed at the United States.

25 That was the law since Calder, that was the law that

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1 O'Neill used to affirm your Honor's dismissal of NCB, it is the
2 law that Waldman adopted. You can find that in the Waldman
3 decision at page 339 of 835 F.3d. Nothing has changed. It is
4 a creative reading of Waldman. Certainly, the court concluded
5 in Waldman that under those standards, the defendants' actions
6 were random, attenuated, and fortuitous, but that is not the
7 standard. The standard remains as expressed, and that is the
8 standard your Honor applied in Terrorist Attacks IV and it is
9 the standard the Court of Appeals applied in O'Neill, which
10 perhaps is why Mr. Cozen started out by saying, your Honor,
11 just in case you didn't know, the Supreme Court has asked for
12 the use of the Solicitor General rule.

13 Well, the Solicitor General has not yet provided views
14 in Waldman. The Solicitor General twice in Terrorist Attacks,
15 on the same question presented, did provide it as Mr. Cozen
16 mentioned. Sometimes the court is interested in these views.
17 What the Solicitor General did twice in Terrorist Attacks was
18 agree that the Second Circuit had the standard right. That
19 Calder provided the rules you have the decision, and that
20 Terrorist Attacks III and then O'Neill correctly applied the
21 Calder expressly aimed, purposely directedness.

22 The fact that the Solicitor General has been asked to
23 provide views to the Supreme Court in Waldman, it is not
24 probative of anything. What is probative is this: Waldman is
25 the law of this circuit. Whether he likes it or not, that is

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1 the case that governs here and that is the case that requires
2 adherence to O'Neill and the dismissal of NCB.

3 But what he really boils it down to is, take JASTA and
4 lay it side by side with the same other tired recycled
5 allegations. JASTA created a new legal environment. Well, it
6 is quite clear that plaintiffs lobbied congress to get JASTA.
7 I get that. That is totally fine, totally fair.

8 Unfortunately, there was no constitutional convention for them
9 to lobby and they couldn't change the due process laws. And it
10 doesn't matter what congress said in JASTA when it comes to the
11 due process clause. Mr. Cozen points to 2(a)(6) of the
12 legislative findings in JASTA saying it is congress' desire
13 that the jurisdiction of the United States Courts be exercised
14 to their fullest extent in terrorist cases.

15 Well, respectfully, your Honor, that was always the
16 law of the ATA even before JASTA's amendments. It has always
17 been the law that the statutory provisions of the Anti-
18 Terrorism Act for jurisdiction and service of process are
19 intended to reach the full extent of the due process clause.
20 That not only begs the due process question, it doesn't answer.
21 The answer to the due process question comes out of O'Neill, it
22 comes out of Waldman, and it says, with Waldman ratifying
23 O'Neill, that when it comes to the two types of acts alleged
24 against NCB, the overseas provision of financial services to
25 individuals or charity customers or donations to charities

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1 overseas, that those don't meet the due process clause.

2 That legal environment hasn't changed one bit. The
3 Lelchhook case out of the District of Massachusetts, we cite on
4 page six of our reply brief, makes this point precisely. It
5 says, first of all, legislative findings like 2(a)(6) that
6 Mr. Cozen mentioned, they don't mean anything. But as a matter
7 of constitutional law, congress cannot prove findings or
8 otherwise alter the dimensions of the due process clause.
9 Perhaps the statutory landscape has changed in some respect.
10 Perhaps it has changed as to subject matter jurisdiction on the
11 FSIA. That was this morning's argument. Perhaps it has
12 changed the liability standards, as Mr. Curran and Mr. Gauch
13 held with 12(b)(6). But when it comes to 12(b)(2) personal
14 jurisdiction, JASTA is beside the point.

15 What Mr. Cozen then did is what every plaintiff's
16 lawyer who tries to change the due process standards argued.
17 They say the Supreme Court in Holder v. Humanitarian Law
18 Project says, We the courts have to pay attention to what
19 congress finds. Well, that is true, but only as far as it
20 goes. All the Humanitarian Law Project says when it comes to
21 questions of subject matter jurisdiction, does congress have
22 the power to legislate, to reach certain types of overseas
23 acts. We defer to congressional findings. But another Supreme
24 Court case, Walden, which we cite in our briefs, says that when
25 it comes to personal jurisdiction, it is solely a question of

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1 the courts of what the due process clause requires --

2 No congressional finding could alter what the due
3 process clause requires. The due process clause has been
4 applied consistently from Calder to O'Neill to Waldman. And in
5 O'Neill, which is not only the law of this case but the law of
6 this circuit, it says NCB should be dismissed on allegations
7 that Mr. Cozen is the first one to concede are no different
8 today than they were previously.

9 Finally, he says, you know, they did try to change the
10 liability standards for the ATA and JASTA by adding the aiding
11 and abetting count. That must mean something for jurisdiction.
12 Well, the answer is it means nothing. The reason why is that
13 liability standards do not equate with jurisdictional
14 standards.

15 How do we know this? What is the Calder test?
16 Intentionally tortious activity, part one; expressly aimed or
17 purposely directed at the United States, that's part two. All
18 JASTA could do is change the definition of intentionally
19 tortious activity in part one. It could say things that work
20 regarding tortious before are now regarded as tortious today.
21 It cannot change the constitutional component, which is what is
22 expressly aimed or purposely directed at the United States.

23 So what it boils down to this. Mr. Cozen offers you
24 two things: A motion for reargument saying that this court and
25 the Second Circuit were wrong in their application of the due

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1 process standards in Terrorist Attacks IV and O'Neill. That is
2 the decidedly incorrect and contrary to the law of the Circuit
3 doctrine, and that somehow congress, through legislative
4 findings, could change the due process as a matter of law.
5 That is incorrect.

6 Because of that, there really is nothing new to offer
7 and that, indeed, is why the JPML sent this case here, so your
8 Honor could apply the previous rulings made by this court and
9 by the Second Circuit and dismiss NCB.

10 Thank you, your Honor.

11 THE COURT: Thank you.

12 MR. GAUCH: Your Honor, just two brief points. First,
13 plaintiffs continue to raise the red herring of specific
14 intent, which no one, your Honor has not required specific
15 intent, the Second Circuit has not required specific intent.
16 It is not that the plaintiffs have to show that a particular
17 defendant aided a particular attack at a particular place and
18 time, as Mr. Cozen put it.

19 As your standard explained it, it is interesting that
20 when Mr. Cozen paraphrased your standard, he admitted two key
21 words, which I think are the crux of the issue. This court
22 required that the conduct be intended to directly aid the
23 commission of a terrorist attack with knowledge that the brunt
24 of the injuries will be felt in the United States. Mr. Cozen
25 left out the "with knowledge."

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1 They want to be able to say that any aid to Al Qaeda
2 anywhere in the world is enough for jurisdiction because the
3 brunt of Al Qaeda's activities ended up, on 9/11, tragically
4 being felt in the United States. But it is that "with
5 knowledge" element that is required. It is not specific
6 intent, but it is knowledge. It is clear that your Honor held
7 that, the Second Circuit affirmed that, the Solicitor General
8 agreed with it. Everybody is on board with that as the
9 requisite knowledge that has to be shown here.

10 Second point. Mr. Cozen said something that I think
11 illustrates one of the problems that we have here in suggesting
12 that we go into a second go-around in the jurisdictional
13 discovery. He went through illustrating how this case is
14 really just a do-over. He went through a whole litany of facts
15 that were put before the court in the first litigation,
16 including the transfer of Osama bin Laden's shares to Ghalib
17 bin Laden and the money being put in the trust in 2000.

18 The question which he raised of what happened to the
19 distributions on the shares between 1993 and 2000. He said
20 that is unaccounted for. If they get discovery, that will be
21 accounted for. It is a good question. Mr. Haefele asked that
22 question ten years ago. Judge Maas ordered us in 2008 to
23 address the receipt and subsequent disposition of any dividends
24 distributions or similar payments arising out of the custody --

25 THE COURT: Slow down. Slow down.

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1 MR. GAUCH: The receipt and subsequent disposition of
2 any dividends, distributions, or similar payments arising out
3 of the custody, control, or ownership of Osama bin Laden's
4 shares of SBG stock, and he transferred assignment or pledge of
5 the OBL shares, as well as any income derived thereby, and any
6 increase in the value of OBL's shares.

7 All of this was raised in jurisdictional discovery
8 before. We addressed it. We had a hearing before Judge Maas.
9 We addressed these issues. The short answer here was that
10 there were no distributions, so there is nothing to be
11 accounted for.

12 But the problem here is not that the plaintiffs' have
13 not had jurisdictional discovery. The problem is they don't
14 like the answers. Judge Maas cut off discovery when they
15 started going over new ground. Your Honor affirmed that
16 decision. Your Honor looked at the evidence the last time
17 around, found there was nothing to support personal
18 jurisdiction. The Second Circuit affirmed that. We're back
19 here on virtually the same allegations, and the court should
20 reach the same result.

21 Thank you.

22 THE COURT: Thank you.

23 MR. CURRAN: Chris Curran for Al Rajhi Bank on
24 12(b)(6).

25 When Judge Casey addressed our arguments the first

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1 time around and he thought there was aiding and abetting
2 liability. He addressed Halberstam and still found that the
3 allegations were insufficient under that standard. Of course,
4 then when it went up to the Second Circuit, Rothstein had
5 intervened, and the Second Circuit affirmed on the basis of
6 proximate causation.

7 My point there being, the prior decisions of this
8 court and the Second Circuit foreclosed the arguments that
9 Mr. Cozen is advancing here, but if this court were to take his
10 invitation and lay side by side the new statute, JASTA, with
11 the allegations being made here, we would lead to the same
12 conclusion in any event. But we would have to be careful to
13 look at the actual language of both JASTA and the allegations
14 that have been made, because I don't think Mr. Cozen set that
15 forth very clearly.

16 JASTA says, aiding and abetting by knowingly providing
17 substantial assistance. Again, the notion of proximate
18 causation is famously flexible. We all know that, not only
19 from Rothstein, but also going back to Palsgraf from law
20 school. It is a flexible concept. But, nonetheless, there has
21 to be substantiality, substantial assistance. The same
22 language we see not only in JASTA, but in Rothstein, in
23 Halberstam, and in all cases dealing with aiding and abetting.

24 Now, Mr. Cozen might have been getting too excited,
25 because a lot of his descriptions of the allegations against

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1 Al Rajhi Bank were quite embellished. He referred to Al Rajhi
2 Bank having accounts by Al Haramain, the charity which was a
3 designated charity. Well, Al Haramain of Saudi Arabia wasn't
4 designated until 2008. That doesn't really advance their
5 position on Al Rajhi Bank's knowledge or causation.

6 Foreign affiliates of Al Haramain, the charity,
7 outside of Saudi Arabia were designated earlier, but not until
8 2002. So Al Rajhi Bank can't be condemned for having accounts
9 of Al Haramain or other charities, well before they were known
10 to be or alleged to be supporters of Al Qaeda.

11 The amended complaint here is devoid of any allegation
12 that Al Rajhi Bank ever had any designated party as a bank
13 customer or that it transacted business with any designated
14 party.

15 Mr. Cozen also said that Al Qaeda used accounts at
16 Al Rajhi Banks. There is no factual allegations supporting
17 that. In any event, even if there were, the use or misuse by
18 customers or others of a bank's routine banking services is not
19 a basis for a cognizable claim.

20 Mr. Cozen also said that Mr. Moussaoui said that the
21 bank moved around money for Al Qaeda. I just re-read the
22 testimony of Moussaoui. He doesn't even refer to Al Qaeda in
23 his discussion of Al Rajhi Bank. He refers to some charities
24 and he refers to the bank being able to move money around.
25 There is no reference to Al Qaeda.

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1 There is a huge missing link in all of the allegations
2 against Al Rajhi Bank. The link is Al Rajhi Bank has no direct
3 connection to Al Qaeda. Everything is through some intervening
4 party. It is usually the charities, but the plaintiffs
5 themselves allege in their amended complaint that the charities
6 hid any wrongdoing they were doing in the context of other
7 humanitarian aid. Again, the only charity where there is an
8 allegation that Al Rajhi Bank donated to was the Saudi High
9 Commission. I am not aware of any allegation by the plaintiffs
10 ever that the Saudi High Commission passed on the money to
11 Al Qaeda.

12 Mr. Cozen found it interesting that Al Rajhi Bank
13 donated \$1 million in the mid '90s to this charity. Usually
14 people get praised for those kind of corporate acts, not
15 condemned.

16 Mr. Cozen also said -- and he referred in this one to
17 a specific paragraph of the complaint -- he said paragraph 186
18 refers to SAAR, which I think he said was a designated party.
19 That is not true. SAAR has never been designated. He said
20 that SAAR sent \$26 million to the leaders of Al Qaeda. I just
21 read that paragraph and it doesn't say that. So if there is
22 going to be any comparison between JASTA and the allegations of
23 the complaint, it's got to be done in a meticulous and
24 assiduous way, and not with a bunch of arm-waving and
25 embellishment of the allegations.

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1 Thank you very much, your Honor.

2 THE COURT: Thank you.

3 Thank you, all very much. I will get back to you as

4 soon as possible.

5 (Adjourned)

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